

DOCKET

EDITOR'S NOTE

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21
No. 85-1199-ASX Title: First English Evangelical Lutheran Church of
Status: GRANTED Glendale, Appellant
V.
County of Los Angeles, California
ocketed: Court: Court of Appeal of California,
January 15, 1986 Second Appellate District
e also: Counsel for appellant: Berger, Michael M.
86-374 Counsel for appellee: Clinton, De Witt, W., White, Jack R.

Entry	Date	Note	Proceedings and Orders
1	Jan 15 1986	G Statement as to jurisdiction filed.	
2	Feb 14 1986	Motion of appellee Los Angeles to dismiss or affirm filed.	
3	Feb 19 1986	DISTRIBUTED. March 7, 1986	
4	Feb 22 1986	X Reply brief of appellant First Eng. Evangelical, etc. filed.	
5	Jun 23 1986	REDISTRIBUTED. June 26, 1986	
6	Jun 30 1986	PROBABLE JURISDICTION NOTED.	
7	Aug 5 1986	***** Order extending time to file brief of appellant on the merits until September 4, 1986.	
8	Aug 13 1986	Joint appendix filed.	
9	Aug 28 1986	Order extending time to file brief of appellant on the merits until September 9, 1986.	
10	Sep 4 1986	Brief amicus curiae of Natl. Assn. of Home Builders filed.	
11	Sep 8 1986	Brief amicus curiae of Pacific Legal Foundation, et al. filed.	
12	Sep 9 1986	Brief amicus curiae of American College of Real Estate Lawyers filed.	
13	Sep 9 1986	N Motion of appellee to dismiss appeal filed.	
14	Sep 10 1986	DISTRIBUTED. Sept. 29, 1986. (Motion of appellee to dismiss appeal).	
15	Sep 9 1986	Brief of appellant First English Evangelical filed.	
16	Sep 9 1986	Brief amicus curiae of National Association of Realtors filed.	
17	Sep 9 1986	Brief amicus curiae of CA Association of Realtors filed.	
18	Sep 9 1986	Brief amicus curiae of CA Building Industry Assn. filed.	
19	Sep 15 1986	Order extending time to file brief of appellee on the merits until November 4, 1986.	
20	Sep 12 1986	Application of California, et al. for leave to file a brief as amici curiae in excess of the page limitation filed (A-203), and order denying same by Rehnquist, J., on September 16, 1986.	
21	Sep 12 1986	Opposition of appellant to motion of appellee to dismiss appeal filed.	
22	Oct 6 1986	Further consideration of the motion of appellee to dismiss the appeal is deferred to the hearing of the case on the merits. Justice Scalia took no part in the consideration or decision of this order.	
23	Oct 6 1986	Application of the United States for leave to file a brief as amicus curiae in excess of the page limitation	

ry	Date	Note	Proceedings and Orders
	Oct 27 1986		filed (A-315), and order granting same by O'Connor, J., on Oct. 30, 1986. The brief may not exceed 35 pages.
Nov	4 1986		Brief of appellee Los Angeles filed.
Nov	4 1986		Brief amicus curiae of Conservation Foundation, et al filed.
Nov	4 1986		Brief amicus curiae of Natl. Assn. of Counties, et al filed.
Nov	4 1986		Brief amicus curiae of United States filed.
Nov	4 1986		Brief amicus curiae of California, et al. filed.
Nov	3 1986		Brief amicus curiae of Los Angeles, CA, et al. filed.
Nov	7 1986		CIRCULATED.
Nov	14 1986		SET FOR ARGUMENT. Wednesday, January 14, 1987. (4th case)
Jan	7 1987	X	Reply brief of appellant First English Evangelical filed.
Jan	14 1987		ARGUED.

JURISDICTIONAL

STATEMENT

85-11997

Supreme Court, U.S.

FILED

JAN 15 1986

JOSEPH F. SPANIOL, JR.
CLERK

No. 85-_____

**In the Supreme Court of the
United States**

October Term, 1985

FIRST ENGLISH EVANGELICAL LUTHERAN
CHURCH OF GLENDALE, A California corporation,

Appellant,

v.

COUNTY OF LOS ANGELES, CALIFORNIA,

Appellee.

APPEAL FROM
COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SEVEN

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

The Central questions in this case are already before this Court in *MacDonald, Sommer & Frates v. County of Yolo*, No. 84-2015 [prob. juris. noted]:

1. When a local government agency regulates private property in such a way that no economically viable use is left to the owner, has the property been taken within the meaning of the Fifth and Fourteenth Amendments to the Constitution?

2. When property is taken by the regulatory action of a local government agency, is just compensation an appropriate remedy?

3. Does California's unique rule, that just compensation is *never* an appropriate remedy for a regulatory taking of property, violate the requirements of the Fifth and Fourteenth Amendments to the Constitution as interpreted by this Court?

4. In light of the difficulty experienced by this Court in locating an appropriate regulatory taking case in which to rule on the merits (see *Agins v. City of Tiburon* [1980] 447 US 255; *San Diego Gas & Elec. Co. v. City of San Diego* [1981] 450 US 621; *Williamson County Reg. Plan. Comm. v. Hamilton Bank* [1985] ___ US ___, 87 L Ed 2d 126), would it be prudent to consider this case as a companion to *MacDonald, Sommer & Frates v. County of Yolo*, No. 84-2015, (or hold it pending determination of *MacDonald*) to increase the likelihood that a reviewable judgment is before the Court?

PARTIES

All parties to this appeal are listed in the caption. In the proceedings below, separate causes of action were joined against the Los Angeles County Flood Control District. That agency has been held to be a separate entity from the County (see App. A, p A8) and is not involved in the appeal to this Court. The judgment between the plaintiff and the County of Los Angeles is final.

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No. 85-_____

In the Supreme Court of the
United StatesOctober Term, 1985FIRST ENGLISH EVANGELICAL LUTHERAN
CHURCH OF GLENDALE, A California corporation,*Appellant,*

v.

COUNTY OF LOS ANGELES, CALIFORNIA,

Appellee.

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the Court of Appeal (App. A) was not published. The California Supreme Court denied review, with three of the seven Justices expressing the belief that review should have been granted. (App. C)

JURISDICTION

For twenty years, Appellant First English Evangelical Lutheran Church (First Church) operated a camp on 21 acres in the mountains north of Los Angeles. Buildings had been constructed primarily by church members. The camp was used for weekend retreats and summer camp for church members and as a recreational area for handicapped children of all denominations.

Heavy storms in 1978 precipitated a flood which destroyed the camp.

Following the storms, the County passed a temporary moratorium on any reconstruction in the area. (App. F, p A31) Thereafter, the prohibition of any construction or reconstruction was made permanent. (App. F, pp A32-A33)

First Church sought compensation in inverse condemnation because the effect of the County's ordinance is to take the property by denying First Church economically viable use of it.

The trial court granted the County's Motion to Strike this cause of action¹ on the ground that the California Supreme Court's decision in *Agins v. City of Tiburon* (1979) 24 Cal 3d 266, aff'd on other grounds (1980) 447 US 255, prohibited any inverse condemnation cause of action based on government regulation. (App. D)

On appeal, the California Court of Appeal affirmed the dismissal based on the *absence* of an *explicit* holding from this Court that the California rule of non-compensation is wrong:

¹Other causes of action were resolved in the County's favor at trial and that judgment was sustained on appeal. The other causes of action present no Federal questions and are not involved in the appeal to this Court.

"We conclude that *because the United States Supreme Court has not yet ruled on the question of whether a state may constitutionally limit the remedy for a taking to nonmonetary relief, this court is obligated to follow Agins.*" (App. A, p A16; emphasis added.)

The judgment of the Court of Appeal was rendered June 25, 1985. (App. A) A timely Petition for Rehearing was denied July 25, 1985. (App. B)

A timely Petition for Review was filed in the California Supreme Court. After extending its time to act, the California Supreme Court denied review October 17, 1985, with three Justices expressing the opinion that review should be granted. (App. C)

A timely Notice of Appeal to this Court was filed January 9, 1986. (App. G)

Jurisdiction of this Court is invoked pursuant to 28 USC §1257(2), because a local ordinance was challenged as violating the U.S. Constitution and the ordinance was upheld.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

"... nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

"SECTION 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Los Angeles County Code §§22.44.220 and 22.44.230, and Los Angeles County Ordinance No. 11855 are reproduced in Appendix F.

RAISING THE FEDERAL QUESTION

The complaint alleged the Constitutional invalidity of the building prohibition as a taking of private property for public use without just compensation. The Federal Constitutional question was thus raised at the earliest possible time and reiterated in all trial and appellate briefs dealing with this cause of action.

STATEMENT OF THE CASE

This case involves what used to be a camp called Lutherglen, maintained by First Church on 21 acres of land in the mountains of the Angeles National Forest north of the City of Los Angeles. The camp was developed by First Church as a place for retreats and recreation by church members and handicapped children of all denominations.

In the winter of 1977-1978, a forest fire denuded the hills around Lutherglen and subsequent rainfall caused a flood which destroyed the camp.

After the storm, the County adopted Ordinance No. 11855, temporarily prohibiting any construction in the area. (App. F, p A31) The prohibition was then made permanent. (Los Angeles County Code §§22.44.220, 22.44.230; Ordinance No. 12413 [App. F, pp A32-A33])

The ordinance prohibits *all* use of Lutherglen, even re-creation of the buildings swept away in the disaster.

The complaint alleged that this prohibition of use was an unconstitutional taking of property for which First Church sought just compensation.

The trial court struck the cause of action, holding that the California Supreme Court's decision in *Agins* forbade any such action for damages. (App. D) Judgment was entered thereafter. (Appendix E)

The Court of Appeal affirmed, holding that, until this Court expressly overrules the California Supreme Court's conclusion in *Agins*, lower California courts have no choice but to apply *Agins*. (App. A, p A16)

The California Supreme Court denied review, declining the opportunity to re-examine *Agins* in light of later decisions of this Court and the Federal Courts of Appeal. Three Justices expressed the belief that review should have been granted. (App. C)

Notice of Appeal to this Court was timely filed January 9, 1986 in the California Court of Appeal, Second Appellate District, Division Seven. (App. G)

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

INTRODUCTION

The California judiciary has consciously charted a course which is at odds with this Court's Constitutional teachings regarding the just compensation clause. (See Willemsen & Phillips, *Down-Zoning and Exclusionary Zoning in California Law* [1979] 31 Hastings L.J. 103, 121.)

The California Supreme Court has not only repeated its conclusion that stringent governmental regulation of property *cannot* result in a "taking" which requires compensation (*Agins v. City of Tiburon* [1979] 24 Cal 3d 266, aff'd on other grounds [1980] 447 US 225; *Furey v. City of Sacramento* [1979] 24 Cal 3d 862), it has refused numerous opportunities to grant review of lower court decisions applying its rule (e.g., the case at bench; *MacDonald, Sommer & Frates v. County of Yolo*, No. 84-2015 [prob. juris. noted]). As a consequence, California's Courts of Appeal feel powerless to do anything but follow the California Supreme Court's rule

in *Agins* that there can be no compensation for regulatory stultification of the use of private property. (See, e.g., the opinion at bench [App. A, pp A15-A16]; *Aptos Seascape Corp. v. County of Santa Cruz* [1982] 138 Cal App 3d 484, 493; *Gilliland v. County of Los Angeles* [1981] 126 Cal App 3d 610, 617.)

While numerous Federal Courts of Appeals, as well as the Supreme Courts of other states, have held that compensation is Constitutionally required in cases like this (see cases collected herein at p 9, fn 6), the situation in California was aptly summed up by the Court of Appeal in this case:

"We conclude that because the United States Supreme Court has not yet ruled on the question of whether a state may constitutionally limit the remedy for a taking to nonmonetary relief, this court is obligated to follow *Agins*." (App. A, p A16)

The California Supreme Court will not voluntarily accept this Court's land use teachings. It must be directly ordered to do so. Without such direction from this Court, the rights of California property owners are worth little, as they are judicially unprotected.

CALIFORNIA'S COURTS AFFORD NO PROTECTION TO THE RIGHTS OF PRIVATE PROPERTY OWNERS

This case brings before the Court the philosophical quirk which has become the hallmark of California land use law:

California government agencies—both state and local—treat people who own property as though they have no rights. They are encouraged in this attitude by the California judiciary,

which affords property owners no protection of their right to use their land.²

One wishes such a conclusion were merely an advocate's hyperbole. Sadly, it is not. It is amply verified by the scholarly assessments quoted at pp 10-12 in this Brief.

Through decisions such as *HFH, Ltd. v. Superior Court* (1975) 15 Cal 3d 508 [no inverse condemnation cause of action for harsh regulation], *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal 3d 110 [general planning cannot constitute a taking of property], *Agins v. City of Tiburon* (1979) 24 Cal 3d 266, aff'd on other grounds (1980) 447 US 225 [no right to compensation even if a regulation effects a taking], and *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal 3d 785 [there is almost no such thing as a vested right to use property], the California Supreme Court has told government agencies that they may enforce virtually any land use regulation they wish, and disregard individual rights³ which are fundamental to our society⁴ without concern for judicial restraint. The California Courts of Appeal—as illustrated by the decision in this case—have enforced, built upon, and expanded this philosophy of disparaging the rights of property owners.

²Two astute observers recently concluded that "In California, the courts have elevated governmental arrogance to a fine art." (Babcock & Siemon, *The Zoning Game Revisited* [1985] 253)

³More than a decade ago, this Court held that property rights are as much personal, civil rights as the right to speak or the right to travel. (*Lynch v. Household Fin. Corp.* [1972] 405 US 538, 552)

⁴As this Court aptly noted recently, "... the right of use of property is perhaps of the highest order." (*Dickman v. Commissioner* [1984] ___ US ___, ___, 79 L. Ed 2d 343, 349)

If, by chance, an agency so oversteps the bounds that minimal "relief" is granted (in the form of invalidation of the regulation many years after the damage has been done), California agencies know that such relief is illusory to the property owner and harmless to the agency. In his four-Justice dissent in *San Diego Gas & Elec. Co. v. City of San Diego* (1981) 450 US 621, 655, fn 22, Justice Brennan quoted the advice of a prominent California city attorney (and author of a widely used California land use treatise) to his colleagues as follows:

" 'IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN.

" 'If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra "goodies" contained in the recent [California] Supreme Court case of *Selby v. City of San Buenaventura*, 110 C 3d 10, appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again.

" 'See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good luck.' Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations* (including Inverse Condemnation), in 38B NIMLO Municipal Law Review 192-193 (1975) (emphasis in original)."

As illustrated by the case at bench, government agencies in California have received the message. They rest secure in the knowledge that property owners can be abused with impunity.⁵

While numerous Federal courts, as well as courts in other states, have read this Court's three opinions in *San Diego Gas & Elec. Co.* as expressing a view that California's treatment of property owners is Constitutionally unacceptable,⁶ California continues its course unabated. It is apparent that there will be no change of that aberrant course without explicit direction from this Court.

⁵Justice Brennan cogently noted in *San Diego Gas & Elec. Co.* that California's sole "remedy" of invalidation provides no remedy for years of non-use and provides no incentive to government agencies to act otherwise. (450 US at 656)

Under California's system, government agencies know they have nothing to lose by issuing use-stultifying regulations. Under no circumstances will California courts do more than order the offender to stop.

⁶See *Hernandez v. Lafayette* (5th Cir 1981) 643 F 2d 1188, 1199-1200; *Hamilton Bank v. Williamson County Reg. Plan. Comm'n* (6th Cir 1984) 729 F 2d 402, 408, rev'd on other grounds sub nom. *Williamson County Reg. Plan. Comm'n v. Hamilton Bank* (1985) ___ US ___, 87 L Ed 2d 126; *Barbian v. Panagis* (7th Cir 1982) 694 F 2d 476, 482, fn. 5; *Nemmers v. City of Dubuque* (8th Cir 1985) 764 F 2d 502, 505, fn 2; *In re Air crash in Bali* (9th Cir 1982) 684 F 2d 1301, 1311, fn. 7; *Martino v. Santa Clara Valley County Water Dist.* (9th Cir 1983) 703 F 2d 1141, 1148; *Fountain v. Metro Atlanta Rapid Transit Auth.* (11th Cir 1982) 678 F 2d 1038, 1043; *Florida Rock Indus., Inc. v. U.S.* (Cl Ct 1985) 8 Cl Ct 160, ___, fn. 10; *Burrows v. Keene* (NH 1981) 432 A 2d 15, 20; *Pratt v. State* (Minn 1981) 309 NW 2d 767, 774; *Ripley v. Lincoln* (ND 1983) 330 NW 2d 505, 510; *Zinn v. State* (Wis 1983) 334 NW 2d 67, 72; *Anniceli v. South Kingston* (RI 1983) 463 A 2d 135, 140. But see *Citadel Corp. v. Puerto Rico Hwy. Auth.* (1st Cir 1982) 695 F 2d 31, 33, fn. 4.

**CALIFORNIA'S HARSH IMPAIRMENT OF
THE RIGHTS OF PRIVATE PROPERTY
OWNERS AND ITS DISREGARD OF THIS
COURT'S DECISIONS ARE MATTERS OF
NATIONAL NOTORIETY WHICH MERIT
THIS COURT'S ATTENTION**

The harsh and aberrant treatment accorded private property owners in California (of which the case at bench is merely illustrative) is a matter of frequent discussion in textbooks and legal journals.

The following scholarly comments are typical:

"The *striking* feature of California zoning law is that the courts in that state have quite *consistently been far rougher* on the property rights of developers than those in *any other state*. In a fairly long series of cases, the California court has upheld restrictions on property rights which *would not be upheld in many other states, and (in some instances) probably not in any other*. Moreover, this group of decisions is not an isolated phenomenon, out of line with the rest; the same *spirit pervades the body of California zoning law generally*." (1 Williams, *American Land Planning Law* [1974] §6.03 at 115-116; emphasis added.)

"*Characteristically* the California courts have been somewhat *tougher* as to the restrictions imposed on property owners; . . ." (5 Williams, *American Land Planning Law* [Rev. ed. 1985] §151.02 at 276; emphasis added.)

"... this must also be recognized as another *striking example* of the *tendency* of the

California court to go *well beyond* the position taken by other courts in upholding municipal requirements in the field of land use controls." (5 Williams, *American Land Planning Law* [Rev ed 1985] §156.07 at 357; emphasis added.)

"In the wide spectrum of holdings reached [in land use cases] in other jurisdictions, one of the *more restrictive and extreme* applications of the tandem theories [of vested rights and estoppel] has been by the California courts." (Kudo, *Nukolii: Private Development Rights and the Public Interest* [1984] 16 The Urban Lawyer 279, 287; emphasis added.)

"[Justice Brennan's] *San Diego* dissent strongly urged an application of the Holmes balancing of public need against private loss that more heavily favors the private landowner and focuses on the economic hardship caused by the *excessive* delay, *onerous* controls, and the *draconian* vested rights rules *prevailing in California*, where the case arose.

* *

"Indeed, the Brennan *San Diego* dissent, in both tone and substance, can easily be read as a reaction against California's *strict* state and local land use regulations. It also may take into account the *inability* of private landowners to obtain *any sort of judicial relief* from instances of *undue* hardship, lengthy procedural delays, and California's *strict* vested property rights rules and virtual judicial dismissal of the Holmes opinion in *Pennsylvania Coal*." (Callies, *The Taking Issue*

Revisited, 37 Land Use Law & Zoning Digest 6, 7 [July, 1985]; emphasis added.)

"[Justice Brennan's *San Diego* dissent] is a chilling premonition for local government while a relief to landowners who have often gone *wholly without remedy in California* and elsewhere when *highly restrictive* government regulations have virtually *destroyed* land values even when the regulation itself is deemed and is held to be *illegal*." (Callies, *Land Use Controls: An Eclectic Summary for 1980-1981* [1981] 13 The Urban Lawyer 723, 725; emphasis added.)

"... anyone who practices public law in California should know better than to expect the California courts to be sympathetic with procedural due process protests when they challenge governmental practices." (Babcock & Siemon, *The Zoning Game Revisited* [1985] 251)

"What *can* one say about the California courts other than that one has to be a madman to challenge a government regulation in that bizarre jurisdiction?" (Babcock & Siemon, *The Zoning Game Revisited* [1985] 257; emphasis in original.)

"California has always been notorious for being the first jurisdiction to sustain extreme municipal regulations. Practitioners in other states have joked about why a developer would sue a California community when it would cost a lot less and save much time if he simply slit

his throat." (Babcock & Siemon, *The Zoning Game Revisited* [1985] 293)

That California has disregarded this Court's land use teachings is demonstrated by Justice Brennan's *San Diego Gas & Elec. Co.* dissent. In Justice Brennan's words, "[The California] holding flatly contradicts clear precedents of this Court." (450 US at 647) Justice Brennan's canvassing of this Court's decisions speaks eloquently. A comparison of his conclusions with those of the California Supreme Court in *Agins v. City of Tiburon* (1979) 24 Cal 3d 266, *aff'd* on other grounds (1980) 447 US 255, does likewise:

Agins

"We review the availability of inverse condemnation as a landowner's remedy when a public agency has adopted a zoning ordinance which substantially limits use of his property. We will conclude that although a landowner so aggrieved may challenge both the constitutionality of the ordinance and the manner in which it is applied to his property by seeking to establish the invalidity of the ordinance either through the remedy of declaratory relief or mandamus, he may not recover damages on the theory of inverse condem-

San Diego G & E

"Invalidation unaccompanied by payment of damages would hardly compensate the landowner for any economic loss suffered during the time his property was taken.

"Moreover, mere invalidation would fall far short of fulfilling the fundamental purpose of the Just Compensation Clause. That guarantee was designed to bar the government from forcing some individuals to bear burdens which, in all fairness, should be borne by the public as a whole. [Citations.]" (450 US at 656)

Agins

nation.” (24 Cal 3d at 269-270)

“In combination, the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy, persuade us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief under the circumstances.” (24 Cal 3d at 276-277)

“We are persuaded by various policy considerations to the view that inverse condemnation is an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged.” (24 Cal 3d at 275)

Another clear point of California’s departure from Constitutional protection is demonstrated by this Court’s decision in *Owen v. City of Independence* (1980) 445 US 622. In addition to this Court’s plain holding that a damages remedy is a “. . . vital component . . .” of litigation to vindicate Constitutional rights (445 US at

San Diego G & E

“But the applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments made by the legislative, executive, or judicial branches. Nor can the vindication of those rights depend on the expense in doing so. [Citation.]” (450 US at 660-661)

“The only constitutional requirement is that the landowner must be able meaningfully to challenge a regulation that allegedly effects a taking, and recover just compensation if it does so.” (450 US at 660)

651)—a holding expressly *not* followed in California, as noted above—the philosophy expressed by the California Supreme Court is totally at odds with this Court’s.

The California Supreme Court’s philosophy is based on its view of the “needs of government.” (*Agins*, 24 Cal 3d at 274) The California Court opined that “threat of unanticipated financial liability” through inverse condemnation “will intimidate legislative bodies” and land-use planners and present a “potential for fiscal chaos.” (*Agins*, 24 Cal 3d at 276-277)⁷

In *Owen*, this Court also considered the tension arising out of the increasingly common encounter between a citizen deprived of Constitutional rights and an entity with limited public funds at its disposal. But while the California Supreme Court enshrined the convenience of planners and the defusing of risk to the fisc as the values it found worthy of the highest protection (at the expense of individual rights), this Court reached *the opposite conclusion*. Pointedly repudiating the policy of the California court, this Court noted that it would be unjust to permit an entity “to disavow liability for the injury it has begotten. . . .” (445 US at 651) The threat of financial liability:

“. . . should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens’ constitutional rights.” (445 US at 651-652) !

The threat of financial liability arising from Constitutional infractions disturbed the California court, which

⁷The Constitution is to protect people. California has corrupted that to protecting local government from answering for the harm it does to people.

noted in alarm that it might inhibit cities from exercising governmental powers. This Court concluded that inhibition based on Constitutional concerns is a very healthy thing.⁸ *Owen* encourages studied reflection instead of impulsive, policy-based denial of Constitutional protection, and ratifies the "[e]lemental notion[] of fairness" that "[the party] who causes a loss should bear the loss." (445 US at 654)⁹

Moreover, in an unbroken line of decisions from 1932 to 1985, this Court has consistently held that the appropriate remedy for a taking is compensation. (*Hurley v. Kincaid* [1932] 285 US 95; *United States v. Gerlach Live Stock Co.* [1950] 339 US 725, 752-753; *Dugan v. Rank* [1963] 372 US 609; *Fresno v. California* [1963] 372 US 627; *Regional Rail Reorganization Act Cases* [1974] 419 US 102; *Dames & Moore v. Regan* [1981] 453 US 654, 688-689; *Ruckelshaus v. Monsanto Co.* [1984] ___ US ___, 81 L Ed 2d 815; *U.S. v. Riverside Bayview Homes, Inc.* [1985] ___ US ___)

⁸"After all, it is the public at large which enjoys the benefits of the government's activities," and thus "it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights . . . have been violated." (445 US at 655)

⁹This concept is particularly apposite in land use law, since regulations generate both loss and benefit, and the public which enjoys the benefit can finance the concomitant loss. The essence of just compensation law is equity and fairness. (*United States v. Fuller* [1972] 409 US 488, 490) Its *raison d'être* is to protect citizens from government action which would have the effect of "forcing some people alone to bear public burdens which in all fairness and justice should be borne by the public as a whole." (*Armstrong v. United States* [1960] 364 US 40, 49) Full indemnification to effectuate "natural justice" is the *sine qua non* of the just compensation clause, and its language "should be liberally construed" to that end. (*Monongahela Nav. Co. v. United States* [1892] 148 US 312, 325, 328) All of this is ignored by the California Supreme Court in land use cases.

Indeed, it is difficult to see how this Court could have been clearer, when it unequivocally held in *Ruckelshaus*:

"Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." (___ US at ___, 81 L Ed 2d at 841)

The *Ruckelshaus* holding was re-iterated in December, 1985 in *Riverside Bayview Homes*, in which the Court explained that:

"This maxim rests on the principle that *so long as compensation is available* for those whose property is in fact taken, the governmental action is not unconstitutional." (___ US at ___, emphasis added.)

California refuses to accept this basic precept. It flatly holds that compensation can never be available as a remedy for a regulatory taking.

Thus, by both its holdings and its underlying philosophical rationale, the California Supreme Court has defied this Court's teaching.

Beyond this comparison of case holdings and review of scholarly commentary is a revealing analysis from within the California system. In an article co-authored by a career research attorney (since 1969) for the California Supreme Court, which may provide some insight into the thinking of those who are on that Court, it is noted (with understatement) that:

". . . California law has taken a unique course, rendering decisions of other jurisdictions of little relevance to the California practitioner." (Willemsen & Phillips, *Down-Zoning and*

Exclusionary Zoning in California Law [1979]
31 Hastings L.J. 103, 104)

Later in the article, it is revealed that one of those "... other jurisdictions ..." whose decisions are deemed "... of little relevance ..." is the Federal judicial system:

"In rejecting the remedy of damages for inverse condemnation, California courts have charted a unique course. Their decisions, although resting on principles of fiscal policy and flexibility in planning, put California at odds with some of the federal courts, particularly the Northern District of California. Consequently landowners are likely to file future inverse condemnation actions in federal instead of state courts, thus *forcing the federal courts to face the question of whether to follow HFH and Agins [i.e., California law] or to adhere to federal precedents.*" (31 Hastings L.J. at 121; footnotes omitted; emphasis added.)

The idea of "forcing" a "choice" between decisions of a state court and decisions of *this* Court and other Federal courts on issues of Federal Constitutional law is preposterous. One would have thought the issue settled no later than Appomattox.

The attitude of the California Supreme Court is evident in its treatment of simultaneous Petitions to review the Court of Appeal decisions in *Gilliland v. County of Los Angeles* (1981) 126 Cal App 3d 610 and *Gilliland v. City of Palmdale* (1981) 179 Cal Rptr 627. Both cases involved governmental denial of use of different parts of the same parcel of property. (Part of the property was within the city's jurisdiction, part within the county's.) Both cases were brought in state court seeking relief under 42 USC §1983. Decisions affirming

dismissal of the cases were issued almost simultaneously by two different Court of Appeal panels. The *manner* in which the appellate panels dealt with the cases was startlingly different:

- In the *County* case, the Court of Appeal said it would have to abide by the *California* Supreme Court's view of Federal Constitutional law, even if it was contrary to *this* Court's. (See 126 Cal App 3d at 617.)
- In the *Palmdale* case, by contrast, the Court of Appeal examined California law in light of the opinions issued by this Court in *San Diego Gas & Elec. Co.* and concluded that "*California's position flatly contradicts clear precedent of United States Supreme Court cases.* ..." (179 Cal Rptr at 631; emphasis added.)

The California Supreme Court simultaneously considered whether to review these two decisions. It declined review in both. However, in so doing, it ordered the *Palmdale* opinion deleted from the official reports, thus banishing the critical analysis and leaving as California's rule a holding that *even in Federal Civil Rights Act cases* California will *not* follow Federal law.¹⁰

California is part of this Nation. Its citizens deserve the same protection accorded citizens in other states. Such protection is wholly lacking when the California

¹⁰California's openly rebellious posture is of a type rarely seen in this Court since the demise of the "interposition" doctrine in *Cooper v. Aaron* (1958) 358 US 1, 18-19. This defiance of the Supremacy Clause is reminiscent of the famous "speech" by the trial judge in *Estes v. Texas* (1965) 381 US 532 (quoted in the Chief Justice's concurring opinion [381 US at 566]) in which he proclaimed that his oath was to uphold the *state* constitution, rather than the *federal*.

courts refuse to apply the Constitutional remedy which this Court has held to be mandatory.

California has thumbed its nose at this Court for too long. It has become a nationally acknowledged scandal which is rapidly growing more serious. It is time for this Court to call a halt.

CONCLUSION

California's experimentation with the "invalidation only" remedy has proceeded far enough to paint a graphic picture for this Court of the vice in refusing to grant effective relief.

The audacious acts of California's planners—who feel unrestrained in their treatment of private property owners—should serve as a warning to this Court. Such over-zealous actions need to be curbed, not expanded.

To preserve the protection the Constitution intended for private property owners and to ensure that government planners heed individual rights when planning for the general public weal, First Church prays that the judgment below be reversed and the California rule of non-compensability be consigned to its rightful resting place in historical oblivion.

Respectfully submitted,

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FIRST ENGLISH EVANGELICAL

LUTHERAN CHURCH OF GLENDALE

APPENDIX

APPENDIX A

NOT FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

CLAY ROBBINS

FIRST ENGLISH EVANGELICAL
LUTHERAN CHURCH OF
GLENDALE,

A California corporation,

Plaintiff and Appellant,

v.

COUNTY OF LOS ANGELES,
CALIFORNIA, and LOS ANGELES
COUNTY FLOOD CONTROL
DISTRICT,

Defendants and Respondents.

NO. B003702

(Super.Ct. No.

C 273634)

APPEAL from a judgment of the Superior Court of Los Angeles County. Albert D. Matthews, Judge. Reversed in part and affirmed in part.

Fadem, Berger & Norton, and Michael M. Berger, for Plaintiff and Appellant.

De Witt W. Clinton, County Counsel of Los Angeles County, and Arnold K. Graham, Principal Deputy County Counsel, for Defendants and Respondents.

This is an action for property damage caused by the flooding of plaintiff's 21-acre private campground, Lutherglen, located at the bottom of a canyon in the Angeles National Forest, at 23200 Angeles Forest Highway, Palmdale, California.

Plaintiff purchased Lutherglen in 1957. Twelve acres are flat land, elevated a little above the banks of Mill Creek, a natural watercourse running down the canyon through Lutherglen, and emptying approximately ten miles below into the Big Tujunga Dam. The twelve acres contained a dining hall, two bunkhouses, a caretaker's lodge, an outdoor chapel, and a footbridge across Mill Creek.

The Middle Fork of Mill Creek is the natural drainage channel for the watershed area (watershed area) owned by the National Forest Service (Forest Service) upstream of Lutherglen. The Middle Fork joins Mill Creek about 1-1/2 miles above Lutherglen, just below the point where the Angeles Forest Highway (highway) crosses the Middle Fork at Mileage Marker 16.56 (M.M. 16.56). The highway, built by defendant County of Los Angeles (County) with Forest Service approval, crosses the Middle Fork at about twenty locations in the canyon. At M.M. 16.56, the Middle Fork flows beneath the highway through two metal culverts placed by the County in the highway's solid raised dirt embankment.

About 3,860 acres of the watershed area were burned in a fire known as the Middle Fire in July 1977. It is undisputed that the Middle Fire created a potential flood hazard.¹ Thereafter, on February 9 & 10, 1978, a storm

¹The vegetation of a watershed area normally protects against flooding because the vegetation slows the flow of water, which can then percolate into the soil or be carried away by streams. When the vegetation is burned, however, there is no slowing of

(the storm) dropped a total of 11 inches in the watershed area. The runoff from the storm overflowed the banks of the Middle Fork and Mill Creek. The highway's culverts at M.M. 16.56 were inadequate to handle the volume of water that swept down Middle Fork during the storm.² Lutherglen was flooded and its buildings destroyed.

Plaintiff filed this inverse condemnation action against the County and the Los Angeles County Flood Control District (District), claiming that the damage to Lutherglen constituted a taking without payment of compensation contrary to Article 1, section 19 of the California Constitution.³ The first cause of action alleges that (1) the defendants are liable under Government Code section 835⁴ for controlling the Middle Fork and the highway at M.M. 16.56, which constituted a

the flow, and the crust on the ground formed by the fire's intense heat prevents percolation of water into the soil. Additionally, the ash and debris from the fire increase the bulk of the flow, known as the bulking factor, which increases the erosion damage caused by the runoff.

²Mill Creek at Lutherglen had a capacity of about 6,000 cubic feet of water per second (cfs). During the storm, the peak runoff just below Lutherglen was 8,800 cfs, 6,100 cfs of which came from Middle Fork and 2,700 cfs of which came from Mill Creek. Normally, had the watershed area not been burned, the flow from Mill Creek would have exceeded the flow from Middle Fork. Approximately 380,000 cubic yards of debris and sediment were carried by the runoff from the watershed area. About 12,000 cubic yards were deposited behind the highway at M.M. 16.56, about 38,000 cubic yards were deposited in Lutherglen, and the rest was deposited at Hansen Dam.

³All references concerning the complaint refer to the Second Amended Complaint for Inverse Condemnation filed on January 5, 1981.

⁴Hereafter all section references are to the Government Code unless otherwise indicated.

dangerous condition of public property; and (2) that a County ordinance adopted after the flood constituted an unconstitutional taking of property by prohibiting all use of Lutherglen's 21 acres. The second cause of action alleges that the District engaged in cloud seeding during the storm, for which it is liable in tort and inverse condemnation.

The trial court granted the following pretrial motions: (1) defendants' motion to strike the portion of the first cause of action for damages in inverse condemnation based on the taking of all use of Lutherglen by a County ordinance; (2) the District's motion for judgment on the pleadings on the second cause of action in tort and inverse condemnation based on cloud seeding; and (3) defendants' motion to limit the trial to the first cause of action for damages under section 835, rather than in inverse condemnation.

The trial, which proceeded solely on the section 835 action, was bifurcated and liability was tried to a jury prior to damages. At the close of plaintiff's evidence on liability, the court granted defendant's motion for nonsuit. A judgment of nonsuit dismissing the entire complaint was entered. Plaintiff appeals the judgment of dismissal and also seeks appellate review of the pretrial rulings enumerated above, and of the post-judgment order awarding costs and fees to defendants.

For the reasons discussed below, we will reverse the judgment of dismissal insofar as it dismisses the second cause of action in inverse condemnation based on cloud seeding against the District. The order for fees and costs is also reversed. In all other respects, the judgment is affirmed.

I

THE FIRST CAUSE OF ACTION

A. Standard and Scope of Review

The appellate court in reviewing a nonsuit must view the evidence as though the judgment had gone in favor of a plaintiff-appellant and order a reversal if such judgment can be sustained. (*Turner v. Parsons Co.* (1953) 117 Cal.App.2d 109, 112.)

"A nonsuit or a directed verdict may be granted 'only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff if such a verdict were given.' . . . Unless it can be said as a matter of law, that, when so considered no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury. . . . In other words, the function of the trial court on a motion for a directed verdict is analogous to and practically the same as that of a reviewing court in determining, on appeal, whether there is evidence in the record of sufficient substance to support a verdict." (*Estate of Lances* (1932) 216 Cal. 397, 400; 4 Witkin, Cal. Procedure (2d ed. 1971) Trial, § 353, p. 3153.)

Our review of this appeal shall consider only the grounds specified below in the motion for the nonsuit. (*Moore v. Moffatt* (1922) 188 Cal. 1, 5; *Jacobs v. Freeman* (1980) 104 Cal.App.3d 177, 188.) The reason for this limitation is that the plaintiff should be given the opportunity to correct any deficiency in his proof before a nonsuit is granted. (4 Witkin, Cal. Procedure (2d ed. 1971) Trial, § 362, p. 3159.) Hence, appellate review of nonsuits is not based on the general rule that a judgment should be upheld if it is correct even though the reasons relied upon may be incorrect. (*Lawless v. Calaway* (1944) 24 Cal.2d 81, 92-94.)

B. Liability Under Government Code Section 835

Governmental tort liability in California is controlled entirely by statute. (Gov. Code, § 815, subd. (a): *Low v. City of Sacramento* (1970) 7 Cal.App.3d 826, 831.) The 1963 Act for "Claims and Actions Against Public Entities and Public Employees" (Stats. 1963, ch. 1681, § 1, p. 3266), expressly declares that unless it is otherwise provided by statute, a public entity is not liable for any injury, regardless of whether it arises out of an act or omission of the entity itself, or out of an act or omission of a public employee or any other person. (Gov. Code, § 815, subd. (a).)

Section 835 states:⁵

⁵Section 830 defines the following terms used in section 835:

"As used in this chapter:

"(a) 'Dangerous condition' means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used.

"Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:

"(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or

"(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition."

1. Whether the Highway Proximately Caused the Harm

Plaintiff contends that the highway at M.M. 16.56 constituted a dangerous condition of public property that proximately caused the damage to Luther Glen by obstructing the flow of the Middle Fork. The evidence showed that the County built the highway at M.M. 16.56

"(b) 'Protect against' includes repairing, remedying or correcting a dangerous condition, providing safeguards against a dangerous condition, or warning of a dangerous condition.

"(c) 'Property of a public entity' and 'public property' mean real or personal property owned or controlled by the public entity, but do not include easements, encroachments and other property that are located on the property of the public entity but are not owned or controlled by the public entity."

across the bottom of the Middle Fork, a natural drainage channel, and installed a culvert to allow the water to flow under the highway. After the Middle Fire, the County, in recognition of the potential flood danger, added a second culvert and directed the flow into the two culverts by excavating a 100 foot long and 30 foot wide path in the 150 foot wide channel bed. The two culverts were inadequate to handle the volume of flood waters from the storm. Karl Kniseley, the head pastor of plaintiff church, testified that the road crossing appeared to have been partly breached by the flood. He formed the opinion that the road crossing "with the rain and everything else ended up with the wiping out of Lutherglen camp." However, no expert testimony was introduced on the subject of whether the road crossing or the grading work done in the channel proximately caused the damage to Lutherglen.

(a) Liability of the District.

The uncontroverted evidence shows that the County built and maintained the highway crossing and channel at M.M. 16.56. Plaintiff argues that the District is jointly liable under a theory of agency. But we find that the record fails to support a finding that the District had anything to do with building and maintaining the highway crossing and the channel upstream of M.M. 16.56. Plaintiff also claims that the District is vicariously liable as the County's alter ego, because both entities are governed by the County Board of Supervisors. However, this theory has been soundly rejected in *County of Los Angeles v. Continental Corp.* (1952) 113 Cal.App.2d 207, 220, for reasons we shall not repeat here. Accordingly, we conclude the District cannot be held vicariously liable for the actions of the County.

(b) Liability of the County

Turning to the liability of the County for allegedly obstructing the Middle Fork at M.M. 16.56, plaintiff contends that the trial court erred in finding as a matter of law that the highway crossing and the channel at M.M. 16.56 were not dangerous conditions of public property that proximately caused the damage to Lutherglen. We disagree.

The question of proximate cause is generally held to be a question of fact for the jury. (See 4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 621, p. 2903.) "However, it is well settled that the question of proximate cause, like those of negligence and contributory negligence, becomes one of law where the facts are uncontroverted and only one deduction or inference may reasonably be drawn therefrom [Citations.]" (*Sanders v. Atchison, Topeka & Santa Fe Ry. Co.* (1977) 65 Cal.App.3d 630, 649.)

Here the trial court properly decided the question as a matter of law because the record is devoid of any legally sufficient evidence to establish that the highway obstructed the flow of the Middle Fork, proximately causing the damage to Lutherglen. The only evidence in the record on the issue of proximate cause is Pastor Kniseley's non-expert opinion testimony that he believed that the highway contributed to the damage to Lutherglen. While Pastor Kniseley could properly testify about his perceptions based on viewing the highway after the flood, he could not as a lay witness usurp the jury's function of drawing inferences or conclusions based on his observations. (Evid. Code § 800; see *Northern Cal. Power Co. v. Waller* (1917) 174 Cal. 377, 384; *Waizman v. Black* (1929) 101 Cal.App.610, 613; *Firemen's Fund Ins. Co. v. Romero* (1954) 128 Cal.App.2d 331, 336;

Witkin, Cal. Evid. (2d ed. 1966) § 388, p. 348.) Because Pastor Kniseley was not qualified to render an expert opinion on causation (Evid. Code, §§ 720, subd. (a); 801), we find his testimony is legally insufficient and assume that the trial court properly disregarded his testimony. (See *Pfingst v. Goetting* (1950) 96 Cal.App.2d 293, 307.)

2. Whether the Defendants Controlled the Channel.

Plaintiff contends that defendants owed a duty to provide flood control protection in the channel because the channel constituted a dangerous condition of public property for which defendants are liable under section 835. However, liability under section 835 is predicated on the existence of injuries proximately caused by a dangerous physical condition of public property. "Public property" as used in section 835 is defined as "real or personal property owned or controlled by the public entity" with certain exceptions not pertinent here. (Gov. Code, § 830, subd. (c).) It is undisputed that the defendants do not own the channel. Because we will find that the record lacks sufficient evidence to support a finding that defendants controlled the channel, we conclude there is no basis for liability under section 835 with respect to their failure to provide flood control protection.

First, as previously discussed, there is no evidence in the record that the County's grading of the channel proximately caused the damage to Lutherglen. Therefore, even assuming for the sake of argument that the County controlled a portion of the channel by virtue of its grading work upstream of M.M. 16.56, we find there is no liability under section 835.

Second, plaintiff's reliance on the regulatory acts and investigations conducted by the defendants in the Middle

Fork and Mill Creek area to establish that defendants controlled the channel is misplaced. The review of building plans and issuance of permits⁶ does not establish that the defendants controlled the channel. This case is factually distinguishable from *Stoney Creek Orchards v. State of California* (1970) 12 Cal.App.3d 903, and *Frustuck v. City of Fairfax* (1963) 212 Cal.App.2d 345, where the public entities participated in a public project. Here there was no taking for a public purpose, such as a flood control project; rather it is the very lack of such a project which plaintiff protests. The defendants' mere approval of building plans for a private project provides no basis for finding the existence of control and hence imposing liability. (See *Ellison v. City of San Buenaventura* (1976) 60 Cal.App.3d 453, 459.)

Similarly, the District's ability to protect against flood damage is not enough to establish control under section 835. Plaintiff urges us to follow *Low v. City of Sacramento, supra*, 7 Cal.App.3d 826, 833-834, wherein the court stated: "Where the public entity's relationship to the dangerous property is not clear, aid may be sought by inquiring whether the particular defendant had control, in the sense of power to prevent, remedy or guard against the dangerous condition. . . ." However, examining the District's ability to guard against flood damage is not analytically useful because the District is empowered by statute to control flood waters, to investigate flood dangers, and to protect property from flood damage. (Water Code App., § 28 - 2.) Under

⁶The District approved the building permits for the development of Lutherglen. In the late 1950's, the County Building and Safety Department required plaintiff to reinforce Mill Creek's banks after it built near its banks; in 1977, the Building and Safety Department required the bridge to meet break-away specifications based on District calculations of water flow, or "flood Q's".

plaintiff's test, the District would face potential liability under section 835 whenever a flood caused damage to property within its boundaries. Such a result would be anomalous because, as plaintiff concedes, there is no statutory duty imposed on the District to provide flood control protection in every instance. Moreover, the appellate court decisions have clearly established that the District bears no obligation to provide flood protection in each area of the County against all possible threats of flood danger. As stated in *Weck v. L.A. County Flood Control Dist.* (1947) 80 Cal.App.2d 182, 203, "No duty rested on the district to keep the water out of plaintiffs' lands, as contended by plaintiffs. The statute creating the district contained no mandatory direction to build public improvements of any particular character or design, or any improvement at all. Its failure to construct an impervious and indestructible wall along the wash was not an act constituting the taking or damaging of private property for public use for which compensation would be required. (See Const., art. I, § 14.)"

Plaintiff requests that we reverse on the basis of wrongful exclusion of evidence to show the District's flood protection actions taken in other areas of the Angeles National Forest. However, while we are not limited by the rulings of the trial court as to the admissibility of certain of plaintiff's evidence and may reverse a judgment of nonsuit when relevant evidence was wrongly excluded (*Berger v. Lane* (1923) 190 Cal. 443, 452; *Pete v. Henderson* (1954) 124 Cal.App.2d 487, 491-492), we decline to do so here. The excluded evidence would have been irrelevant to establishing the District's liability in this action.

The order granting defendants' motion for nonsuit on the section 835 cause of action is affirmed.

C. Liability Based on the County Ordinance

Prior to trial, the court granted defendants' motion to limit the scope of trial, thereby preventing plaintiff from seeking damages in inverse condemnation based on the same underlying factual allegations raised in the trial of the section 835 action.

Stated briefly, the inverse condemnation action seeks compensation for the flood damage caused by the alleged taking of property by (1) the highway's obstruction of the Middle Fork, and (2) the lack of flood control protection. To recover in inverse condemnation, it must be shown that the damage was proximately caused by the public improvement. (*Olson v. County of Shasta* (1970) 5 Cal.App.3d 336, 340.) However, as discussed above, plaintiff failed to produce any evidence that the highway caused the damage to Lutherglenn. Moreover, here there was no taking for a public use such as a flood control project. Although plaintiff protests the failure of defendants to provide flood protection, plaintiff has failed to establish the loss of any rights which it had in fact. It must be remembered that the District owes no general duty to provide flood control protection. "As they have lost no rights which they had in fact, there has been no actual 'taking' or 'damaging' of their property which is compensable under article I, section 14." (*Niles Sand & Gravel Co. v. Alameda County Water Dist.* (1974) 37 Cal.App.3d 924, 935.)

Accordingly, we conclude, without deciding the issue, that even if the court erred in restricting the scope of the trial, no prejudice resulted.

D. Liability Based on the County Ordinance

Plaintiff's complaint sought damages for the uncompensated taking of all use of Lutherglenn by County

Ordinance No. 11,855, adopted on January 11, 1979.⁷ The trial court struck this portion of the first cause of action, stating: "[A] careful rereading of the *Agins* [*Agins v. City of Tiburon* (1979) 24 Cal.3d 266] case persuades the Court that when an ordinance, even a nonzoning ordinance, deprives a person of the total use of his lands, his challenge to the ordinance is by way of declaratory relief or possibly mandamus."

In *Agins v. City of Tiburon* (1979) 24 Cal.3d 266, the plaintiffs filed an action for damages in inverse condemnation and for declaratory relief against the City of Tiburon, which had passed a zoning ordinance in part for "open space" that would have permitted a maximum of five or a minimum of one dwelling units on the plaintiffs' five acres. A demurrer to both causes of action was sustained, and a judgment of dismissal was entered. The California Supreme Court affirmed the dismissal, finding that the ordinance did not on its face "deprive the landowner of substantially all reasonable use of his property," (*Agins, supra*, 24 Cal.3d at p. 277), and did not "unconstitutionally interfere with plaintiff's entire use of the land or impermissibly decrease its value" (*ibid.*). The Supreme Court further said that "mandamus or declaratory relief rather than inverse condemnation [was] the appropriate relief under the circumstances." (*Ibid.*)

While it could be argued that the above quoted language in *Agins* was dictum because of the finding that no taking had occurred, we are not persuaded. We agree with the views expressed by Justice Scott on this

⁷The Ordinance states: "A person shall not construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be, located within the outer boundary lines of the interim flood protection area located in Mill Creek Canyon. . . ."

issue in *Aptos Seascope Corp. v. County of Santa Cruz* (1982) 138 Cal.App.3d 484, 493: "[A]s the inverse condemnation issue appears to have been elaborately considered [in *Agins*], it is obviously entitled to great weight. [Citations.] In addition, it is apparent that the Supreme Court itself did not intend its discussion to be considered dictum [Citation], and it has not been treated as such in subsequent Court of Appeal cases."

Plaintiff further argues that the trial court's reliance on the language in *Agins* was misplaced because the United States Supreme Court disapproved *Agins* in *San Diego Gas & Electric Co. v. San Diego* (1981) 450 U.S. 621. In *San Diego Gas*, the plaintiff brought an inverse condemnation action challenging the constitutionality of a zoning ordinance that rezoned the plaintiff's property in part as "open space." The trial court awarded plaintiff damages of over \$3 million. Pending appeal before the California Supreme Court, the case was retransferred to the Court of Appeal for reconsideration in view of *Agins*, which had just been decided. The appellate court, relying on *Agins*, held in an unpublished opinion that the plaintiff could not recover damages through inverse condemnation. The appellate court refused to decide the constitutionality of the zoning ordinance due to disputed fact issues; and the United States Supreme Court dismissed the appeal for lack of a final judgment due to the unanswered federal question of whether there had been a taking of property. (*San Diego Gas, supra*, 450 U.S. at pp. 630, 633.) Nevertheless, the Supreme Court cautioned that "the federal constitutional aspects of [the Court of Appeal's decision that plaintiff is not entitled to a monetary remedy] are not to be cast aside lightly. . . ." (450 U.S. at p. 633.)

Plaintiff contends that despite the Supreme Court's dismissal of the appeal in *San Diego Gas*, a combined

total of five justices through the dissenting and concurring opinions disapproved the view that a state may limit the remedy available for a taking to nonmonetary relief. We disagree; our reading of the decision persuades us that only four justices in the dissenting opinion reached the issue of the availability of monetary damages. Justice Rehnquist's concurring opinion simply stated that *if* he "were satisfied that this appeal was from a 'final judgment or decree' . . . [he] would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan." (*San Diego Gas, supra*, 450 U.S. at pp. 633-634.) Thus the Supreme Court has not yet squarely reached the issue. (See *Aptos Seascape Corp. v. County of Santa Cruz, supra*, 138 Cal.App.3d 484, 492.)

We conclude that because the United States Supreme Court has not yet ruled on the question of whether a state may constitutionally limit the remedy for a taking to nonmonetary relief, this court is obligated to follow *Agins.* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

The order striking the cause of action for damages in inverse condemnation based on the ordinance is affirmed.

In view of the foregoing, we conclude that the trial court properly entered the judgment of dismissal with respect to the first cause of action.

II

THE SECOND CAUSE OF ACTION

The second cause of action alleges that the District, as part of a public project to increase rainfall by cloud seeding, cloud seeded after the instant storm began, increasing the amount and intensity of the storm near

Lutherglen. It is alleged that the increased rain contributed to the flood, debris flow and sedimentation, which contributed to the collapse of the road, which in turn released more water, mud and debris, all causing injury to Lutherglen. Plaintiff claims that the District is liable for this injury under theories of (1) strict liability in tort, and (2) inverse condemnation.

The trial court, after making certain findings of fact, granted the District's motion for judgment on the pleadings on the second cause of action. Then after granting defendants' motion for nonsuit at the close of plaintiff's evidence on the section 835 cause of action, the trial court entered a judgment dismissing the entire complaint. Plaintiff seeks appellate review of the order granting judgment on the pleadings on the second cause of action in this appeal from the judgment of dismissal.

A motion for judgment on the pleadings is like a general demurrer in that it is appropriate only if no cause of action is stated. (See 4 Witkin, Cal. Procedure (2d ed. 1971) § 164, p. 2819, and cases cited therein.) We find that no tort cause of action based on cloud seeding was stated because the District is immune from tort liability except as provided for by statute. (Gov. Code § 815, subd. (a).) The long-standing exception carved out for nuisance cases does not apply here; and *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 932-937, does not stand for the blanket proposition that the public entity may be sued under statutes found in the Civil Code. Therefore the judgment on the pleadings with respect to the tort aspect of the second cause of action is affirmed.

However, the District failed to establish that no cause of action had been stated in inverse condemnation based on cloud seeding. Key factual issues exist concerning

whether the cloud seeding proximately caused flood damage to Lutherglen. The trial court, in refusing to enter the following requested findings of fact, recognized that factual issues existed as to whether: (1) the silver iodide generators could not have contributed to rainfall after 4:15 p.m. on February 9, 1978; (2) the silver iodide generators were too far from Lutherglen to affect rainfall at Lutherglen; and (3) any rainfall added by the cloud seeding could not have increased the rainfall at Lutherglen. The findings that were entered by the court did not touch on causation. The trial court merely found that: (1) two silver iodide generators were operative after 8:00 a.m. on February 9, 1978, and none on February 10, 1978; (2) to produce rain, cloud seeding must take place when it is raining or about to rain; and (3) silver iodide crystals are effective for only one hour.

We conclude that a cause of action has been stated and therefore the court erred in granting judgment on the pleadings on the second cause of action with respect to the inverse condemnation claim. Accordingly the judgment of dismissal should not have been entered with respect to the inverse condemnation claim in the second cause of action.

IV

COSTS AND FEES

The trial court, concluding that defendants were the prevailing parties, awarded them costs of approximately \$3,500, and awarded them attorneys' fees of approximately \$17,500 pursuant to section 998 of the Code of Civil Procedure. Plaintiff challenges this order on appeal, claiming that (1) costs cannot be imposed against the landowner plaintiff who sued in inverse condemnation to determine whether private property had been taken for a public use; and (2) the exception contained

in subdivision (f) of section 998 applies to actions in inverse condemnation as well as to eminent domain actions.

With respect to costs, we are instructed by our Supreme Court's decision in *In re Redevelopment Plan for Bunker Hill* (1964) 61 Cal.2d 21, wherein costs were awarded to an unsuccessful property owner appellant where the issue upon which he was appealing was the public entity's right to take the property for a public use. The court stated: "Public use is, however, one of the issues which owners reluctant to give up their property may justifiably raise in eminent domain proceedings as well as in actions in inverse condemnation or 'in the nature of eminent domain.' Even though they may not prevail on this issue in either trial court or on appeal, it appears from the most recent expressions of the court that they are entitled to be free from costs in litigating it. [Citations.]" (*Id.*, at p. 71.)

In the present case, the property owner plaintiff/appellant does not seek its own costs, but seeks to be free of paying the costs of public entity defendants/respondents. One of the issues litigated both below and on appeal was whether Lutherglen was taken for a public use by the defendants through the construction and maintenance of the highway and channel. We conclude that this case was tried as a case involving eminent domain principles, and plaintiff, even through unsuccessful, is entitled to be free of bearing defendants' costs.

As for attorneys' fees, we conclude, as did the court in *Orpheum Bldg. Co. v. San Francisco Bay Area Rapid Transit Dist.* (1978) 80 Cal.App.3d 863, that subdivision (f) of section 998 is applicable in an inverse condemnation action. Subdivision (f) voids the provisions of section 998 where the plaintiff in an eminent domain proceeding

makes the offer. As stated by the court in *Orpheum, id.*, at p. 878: "We can see no legitimate reason why subdivision (f) should not apply to the action herein. We cannot believe that the Legislature sought to distinguish between government entities when they are called plaintiffs or when they are called defendants in actions that are substantially identical." Therefore, plaintiff's refusal of the section 998 offer does not authorize the imposition of attorneys' fees against plaintiff.

The order awarding costs and fees is reversed.

DISPOSITION

The judgment insofar as it dismisses the inverse condemnation claim in the second cause of action is reversed and the cause is remanded for further proceedings consistent with the views expressed herein. The order for fees and costs is reversed. In all other respects the judgment is affirmed. Each party is to bear its own costs on appeal.

NOT FOR PUBLICATION

THOMPSON, J.

We concur:

LILLIE, P.J.

JOHNSON, J.

APPENDIX B

B003702

Berger and Norton Fadem
501 Santa Monica Blvd
P.o. Box 2148
Santa Monica, CA 90405

JUL 25 1985

B003702

First English Evangelical Lutheran Etc
vs.
County of Los Angeles, Et Al

THE COURT:

Petitions for rehearing denied.

A23

APPENDIX C

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

OCT 17 1985

I have this day filed Order _____

REVIEW DENIED

REVIEW DENIED

Bird, CJ, Broussard, J. & Grodin, J. OF THE
OPINION THAT THE PETITION SHOULD BE

GRANTED.

In re: _____ *No.* B003702
FIRST ENGLISH EVANGELICAL, ETC.

vs.

COUNTY OF LOS ANGELES

Respectfully,

Clerk

APPENDIX D

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DEPT. 81

DATE November 15, 1979

DEPUTY CLERK _____

HONORABLE - Leon Savitch

JUDGE C. J. Longe

HONORABLE

JUDGE PRO TEM

Deputy Sheriff None

Reporter
(Parties and counsel
checked if present)

21

C 273 634

Counsel for
PlaintiffFirst English Evangelical Lutheran
Church of Glendale, etc.,

vs

L.A. County Flood Control District

Counsel for
Defendant

NATURE OF PROCEEDINGS.

Demurrer of defend-
ants, County of L.A.
and L.A. County Flood
Control District, to
plaintiff's complaintMatter, heretofore submitted
on November 1, 1979, is now
determined.The Court has carefully re-
examined the *Tri-Chem* and

Motion of the above defendants, to strike *Shaeffer* cases and some of the cases cited by plaintiff. The Court cannot say as a matter of law that there is no duty on the part of defendants to plaintiff which gives rise to a cause of action for negligence and inverse condemnation. Rather, as expressed by Justice Kaus in the *Tri-Chem* case, there is a limited duty "to not making things worse." This Court believes that the allegations on lines 23 through 29 on page 5 and lines 2 through 15 on page 6, and particularly lines 13 through 15 on page 6, allege that limited duty.

However a careful rereading of the *Agin* case persuades the Court that when an ordinance, even a non-zoning ordinance, deprives a person of the total use of his lands, his challenge to the ordinance is by way of declaratory relief or possibly mandamus.

Therefore, the Court: (i) overrules the demurrer to the Amended Complaint; and (ii) grants the motion to strike the allegations beginning on page 8, line 17 through page 9; Defendant has 30 days to answer the Amended Complaint.

A copy of this order is sent via U.S. mail to counsel.

☐ IT IS STIPULATED that Commissioner may hear this matter as Judge Pro Tem.

☐ TRANSFERRED TO, FROM DEPARTMENT

☐ OFF CALENDAR ☐ On court's own motion

☐ No Appearance

☐ CONTINUED TO IN DEPT. AT AM
PM

☐ Court disqualifies itself ☐ 170.6 CCP affidavit filed
☐ At request of moving party ☐ By stipulation

☐ On court's own motion
☐ REQUEST OF
☐ TRO to remain in full force and effect

☐ Stip. to be filed ☐ On oral/written stipulation.
☐ Moving party ☐ Respondent(s)
☐ TRO dissolved

☐ NOTICE

☐ Waived ☐ By moving party ☐ By respondent(s)

☐ PETITIONER(S) IS/ARE SWORN AND
TESTIFIES/TESTIFY

☐ PETITION IS GRANTED (AS AMENDED)

☐ DECREE IS SIGNED AND FILED.

21 DEPT. 81

MINUTES ENTERED

November 15, 1979

COUNTY CLERK

APPENDIX E

JOHN H. LARSON, County Counsel
 ARNOLD K. GRAHAM, Deputy County Counsel
 648 Hall of Administration
 500 West Temple Street
 Los Angeles, Ca 90012

(213) 974-1869

Attorneys for Defendants
 COUNTY OF LOS ANGELES and
 LOS ANGELES COUNTY FLOOD
 CONTROL DISTRICT

ORIGINAL FILED

APR 14 1983

COUNTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA
 FOR THE COUNTY OF LOS ANGELES

FIRST ENGLISH EVANGELICAL)	
LUTHERAN CHURCH OF GLENDALE,)	
a California corporation,)	NO. C 273 634
)	
Plaintiff,)	
)	JUDGMENT
v.)	OF NONSUIT
COUNTY OF LOS ANGELES and)	
LOS ANGELES COUNTY FLOOD)	
CONTROL DISTRICT)	5-41
)	
Defendants.)	7-41

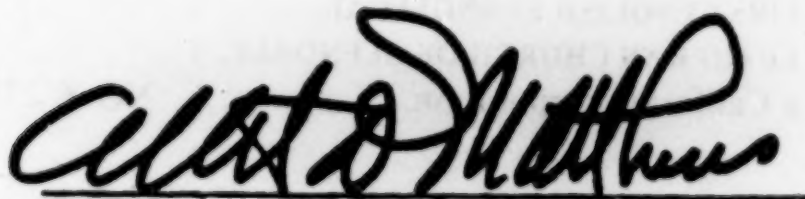
The above-entitled cause came on regularly for trial on February 7, 1983, Richard Norton of Fadem, Berger & Norton appearing as counsel for plaintiff, and John H. Larson, County Counsel, and Arnold K. Graham,

Deputy County Counsel, appearing as counsel for defendants, and the jury was regularly empaneled and sworn to try the cause.

The witnesses and proof on the part of the plaintiff were heard and plaintiff rested, whereupon defendants moved for a judgment of nonsuit for insufficiency of the plaintiff's proof, and the Court having duly considered the motion, granted the same and ordered that judgment be entered accordingly.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendants have and recover judgment against plaintiff; that the complaint on file herein is dismissed; and that defendants recover against plaintiff their costs of suit in the sum of \$

DATED: 4-14-83



ALBERT D. MATTHEWS
Judge of the Superior Court
Department 24

APPENDIX F

COUNTY ORDINANCE:

"ORDINANCE NO. 11,855.

"An interim ordinance temporarily prohibiting the construction, reconstruction, placement or enlargement of any building or structure within any portion of the interim flood protection area delineated within Mill Creek, vicinity of Hidden Springs, declaring the urgency thereof and that this ordinance shall take immediate effect.

"The Board of Supervisors of the County of Los Angeles does ordain as follows:

"Section 1. A person shall not construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be, located within the outer boundary lines of the interim flood protection area located in Mill Creek Canyon, vicinity of Hidden Springs, as shown on Map No. 63 ML 52, attached hereto and incorporated herein by reference as though fully set forth.

"Section 2. Violation of this ordination is punishable by a fine of not more than five hundred dollars (\$500) or imprisonment in the County Jail for a period of not more than six (6) months or by both such fine and imprisonment. Each day during any portion of which any violation of any provision of this ordinance is committed, continued or permitted, constitutes a separate offense.

"Section 3. If any provision or clause of this ordinance or the application thereof to any persons or circumstances is held invalid, such invalidity shall not affect other provisions or application of the ordinance which can be given effect without the invalid provision or

application, and to this end the provisions of this ordinance are declared to be severable.

"Section 4. Studies are now under way by the Department of Regional Planning in connection with the County Engineer and the Los Angeles County Flood Control District, to develop permanent flood protection areas for Mill Creek and other specific areas as part of a comprehensive flood plain management project. Mapping and evaluation of flood data has progressed to the point where an interim flood protection area in Mill Creek can be designated. Development is now occurring which will encroach within the limits of the permanent flood protection area and which will be incompatible with the anticipated uses to be permitted within the permanent flood protection area. If this ordinance does not take immediate effect, said uses will be established prior to the contemplated ordinance amendment, and once established may continue after such amendment has been made because of the provisions of Article 9 of Chapter 5 of Ordinance No. 1494.

"By reason of the foregoing facts this ordinance is urgently required for the immediate preservation of the public health and safety, and the same shall take effect immediately upon passage thereof."

COUNTY CODE:

"22.44.220 Building restrictions. A person shall not use, erect, construct, move onto or, notwithstanding subsections B and C of Section 22.56.1510, alter, modify, enlarge or reconstruct any building or structure within the boundaries of a flood protection district except as provided herein:

"A. Accessory buildings and structures that will not substantially impede the flow of water, including sewer,

gas, electrical, and water systems, approved by the county engineer pursuant to Section 308 of Ordinance 2225, the Building Code, set out at Title 26 of this code;

"B. Automobile parking facilities incidental to a lawfully established use;

"C. Flood-control structures approved by the chief engineer of the Los Angeles County Flood Control District. (Ord. 1494 Ch. 9 Art. 4 § 904.2, 1927.)"

"22.44.230 Lists of districts. The following flood protection districts are added by reference, together with all maps and the provisions pertaining thereto:

District Number	District Name	Ordinance of Adoption	Date of Adoption
1	Sand Canyon	12199	8-1-80
2	Iron Canyon	12200	8-1-80
3	Mill Creek	12413	8-11-81

(Ord. 12413 § 1, 1981; Ord. 1494 Ch. 9 Art. 4 § 904.3, 1927.)"

A35

APPENDIX G

B003702

Received for filing in
Clerk's Office
Court of Appeal
Second Appellate District

IN THE COURT OF APPEAL
SECOND APPELLATE DISTRICT

STATE OF CALIFORNIA

FIRST ENGLISH EVANGELICAL
LUTHERAN CHURCH OF GLENDALE,
A California corporation,

JAN 9 - 1986

vs.

Appellant,

COUNTY OF LOS ANGELES, CALIFORNIA,
et al.,

Respondents.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Appellant First English Evangelical Lutheran Church of Glendale hereby appeals to the Supreme Court of the United States from the decision of the California Court of Appeal entered in this action in favor of the County of Los Angeles on June 25, 1985 and as to which the California Supreme Court denied review on October 17, 1985.

This appeal is taken pursuant to 28 USC §1257(2).

FADEM, BERGER & NORTON



MICHAEL M. BERGER
Attorneys for Appellant

PROOF OF SERVICE BY MAIL

State of California

- SS.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on January 15, 1986, I served the within *Jurisdictional Statement* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

DeWitt W. Clinton,
County Counsel
Douglas M. Elwell
Senior Dep. County Counsel
648 Hall of Administration
500 West Temple Street
Los Angeles, California 90012

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 15, 1986, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)

MOTION

No. 85-1199

2

Supreme Court, U.S.

FILED

FEB 14 1986

JOSEPH F. SPANIOL, JR.
CLERK

**IN THE
SUPREME COURT
OF THE UNITED STATES**

October Term, 1985

FIRST ENGLISH EVANGELICAL
LUTHERAN CHURCH OF GLENDALE,
A California corporation,

Appellant,

vs.

COUNTY OF LOS ANGELES,
CALIFORNIA,

Appellee.

APPEAL FROM
COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SEVEN

MOTION TO DISMISS OR AFFIRM

DE WITT W. CLINTON

County Counsel

DOUGLAS M. ELWELL

Senior Deputy County Counsel

648 Hall of Administration

500 West Temple Street

Los Angeles, California 90012

(213) 974-1879

Attorneys for Appellee

COUNTY OF LOS ANGELES

13PP

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No. 85-1199

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1985

FIRST ENGLISH EVANGELICAL
LUTHERAN CHURCH OF GLENDALE,
a California corporation,

Appellant,

vs.

COUNTY OF LOS ANGELES, CALIFORNIA,

Appellee.

MOTION TO DISMISS OR AFFIRM

Appellee, COUNTY OF LOS ANGELES, pursuant to Rule 16.1(b) of the Rules of the Supreme Court of the United States, moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Appeal of California on the ground that it is manifest that the

appeal herein fails to present a substantial federal question.

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

The Jurisdictional Statement filed by Appellant has set forth the Constitutional and statutory provisions involved in this matter, with one exception:

Los Angeles County Code, Title 26, Section 308(a), is reproduced in Appendix AA.

STATEMENT OF THE CASE

The Jurisdictional Statement filed by Appellant is, with one critical exception, generally accurate. With that one exception noted hereafter, the remaining matters need not be repeated here.

The Appellant's Jurisdictional Statement alleges that Los Angeles County Code §§ 22.44.220, 22.44.230 permanently prohibit any construction and all use of the Appellant's land, Lutherglen. Such an allegation is, on its face, inaccurate and misleading.

Los Angeles County Code §§ 22.44.220, 22.44.230 (Jurisdictional Statement, A32-A33) manifestly allow "accessory buildings and structures" to be constructed in Lutherglen if they are approved pursuant to Title 26, Section 308(a), of that same Code. That Section 308(a), appended hereto in Appendix AA, clearly contemplates and allows the approval of certain types of structures within flood hazard areas such as the one in which Lutherglen is located.

None of the statutory provisions cited say anything about the use to which land can be put.

ARGUMENT

Appellant has based its entire construct of questions on the mistaken premise that the statutory regulations here at issue constitute a totally prohibitory scheme that amounts to a regulatory "taking." From this mistaken premise, the Appellant moves to the suggestion that this case then becomes an appropriate case to serve as the basis for a review of the California Supreme Court's decision in Agins v. City of Tiburon (1979) 24 Cal.3d 266, aff'd on other grounds (1980) 447 U.S. 255.

A review of the provisions at issue, however, exposes the mistaken nature of Appellant's position and discloses the dearth of any substantial federal question raised in this matter.

It is clear that the statutory provisions do not prohibit any particular use of land. The provisions do partially prohibit and/or condition the types of construction which may be carried out on the land in question. There is no showing that these provisions have eliminated any and all viable economic use of the land in question. Given this, the appeal of the within matter fails utterly to present the Court with a case appropriate to reviewing the Agins "invalidation only" remedy for regulatory taking instances.

This case presents nothing more than yet another instance of a governmental entity's properly exercising its inherent police power to protect and preserve the public safety and welfare -- a power which this court has historically and continuously recognized. (See, e.g. Penn Central Transportation Company v. City of New York

(1978) 438 U.S. 125.)

CONCLUSION

The appropriateness of the California Supreme Court's "invalidation only" remedy in regulatory taking cases, as articulated in Agins, supra, continues to be hotly debated both within and without the State of California itself. It may well be that this Court will want to bring that debate before it for resolution -- but this case simply does not present the federal questions at issue in that debate.

DATED: February 14, 1986.

Respectfully submitted,

DE WITT W. CLINTON
County Counsel

By: DOUGLAS M. ELWELL
Senior Deputy
County Counsel

Attorneys for Appellee
COUNTY OF LOS ANGELES

APPENDIX AA

Sec. 308. Prohibited Uses of Building
Sites

(a) Flood Hazard

1. Buildings are not permitted in an area determined by the County Engineer to be subject to flood hazard by reason of inundation, overflow, or erosion.

The placement of the buildings and other structures (including walls and fences) on the building site shall be such that water or mud flow will not be a hazard to the building or adjacent property. Subject to the conditions of subdivision 2 of this subsection (a), this prohibition shall not apply when provision is made to eliminate such hazard to the satisfaction of the County Engineer by providing adequate drainage facilities, by protective walls, by suitable fill, by raising the floor level of the building, by a combination of these methods, or by other means. The County

Engineer, in the application of this subsection, shall enforce, as a minimum, the current Federal flood plain management regulations defined in Title 24, Chapter X, Subchapter B - National Flood Insurance Program, Part 1910.

2. Portions of the unincorporated territory of the County of Los Angeles subject to severe flood hazard by reason of inundation, overflow, erosion or deposition of debris are established as floodways by Ordinance No. 12114 of the County of Los Angeles. Whenever, in such ordinance establishing floodways, reference is made to any floodway, it shall be construed to mean a floodway referred to in this Section.

A person shall not perform work for which a building or grading permit is required within the boundaries of an established floodway if such work increases the flood hazard to adjacent properties by either

increasing the capital floodwater surface elevation, deflecting flows, or increasing bank erosion. Such work may be performed within an established floodway, and a building or grading permit therefor may be issued, where provisions are made to the satisfaction of the County Engineer to avoid such an increase in the flood hazard.

3. The Los Angeles County Flood Control District shall act as a consultant to the County Engineer in permit matters relating to flood control and flood hazard identification, avoidance and mitigation in all areas delineated on maps furnished to the Engineer.

The District shall provide the County Engineer with a series of maps delineating areas subject to flood, mud and debris hazards. The maps shall be prepared by the District, shall be based on the best currently available information, and shall be

updated at least annually.

The County Engineer shall consult with the District with respect to work requiring a building or grading permit in the hazard areas delineated on the maps.

The District shall prepare written reports of its examination of each building or grading permit application for work in the hazard areas delineated on the maps.

The reports shall be considered by the County Engineer in acting upon the application. The actions upon the application shall be supported in writing.

The District shall also act as a consultant whenever the County Engineer proposes to establish by ordinance floodways and water surface elevations regulating the locations of such proposed work.

REPLY BRIEF

Supreme Court, U.S.
FILED

FEB 22 1986

JOSEPH F. SPANIOLO, JR.
CLERK

(3)
No. 85-1199

In the Supreme Court of the United States

October Term, 1985

FIRST ENGLISH EVANGELICAL LUTHERAN
CHURCH OF GLENDALE, A California corporation,

Appellant,

v.

COUNTY OF LOS ANGELES, CALIFORNIA,

Appellee.

APPEAL FROM
COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SEVEN

APPELLANT'S REPLY TO MOTION TO DISMISS OR AFFIRM

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Attorneys for Appellant
FIRST ENGLISH EVANGELICAL
LUTHERAN CHURCH OF GLENDALE

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No. 85-1199

In the Supreme Court of the United States

October Term, 1985

FIRST ENGLISH EVANGELICAL LUTHERAN
CHURCH OF GLENDALE, A California corporation,

Appellant,

v.

COUNTY OF LOS ANGELES, CALIFORNIA,

Appellee.

APPELLANT'S REPLY TO MOTION TO DISMISS OR AFFIRM

INTRODUCTION

The County's Motion to Dismiss or Affirm ill serves this Court. It simultaneously:

- ignores allegations in the complaint that the County regulations prevent all use of the property;¹

¹Because the cause of action was dismissed as a matter of law, the complaint's factual allegations are presumed true. (*Conley v. Gibson* [1957] 355 US 41, 47-48; *Commercial Standard Ins. Co. v. Bank of America* [1976] 57 Cal App 3d 241)

- ignores the holdings of both the trial court and the Court of Appeal, which presumed all use was forbidden but felt compelled to dismiss the inverse condemnation cause of action by the California Supreme Court's decision in *Agins v. City of Tiburon* (1979) 24 Cal 3d 266, aff'd on other grounds (1980) 447 US 225;
- ignores the express conclusion of the Court of Appeal that it had no alternative but to affirm because this Court has not yet explicitly overruled the California Supreme Court's *Agins* decision regarding remedies (App A, p A16); and
- sets up a preposterous defense that County ordinances do *not* prohibit *all* use because they permit the construction of " . . . accessory buildings and structures . . . " (Motion, p 3; emphasis added) without explaining how one builds an *accessory* building when he is prohibited from constructing the *principal* building to which it could be accessory.

There is nothing in the County's motion to deter this Court from noting probable jurisdiction of this case as either a companion to *MacDonald, Sommer & Frates v. County of Yolo*, No. 84-2015 [prob. juris. noted] or as a "back up" in case *MacDonald* suffers some procedural flaw preventing resolution on the merits (as has happened three times with this regulatory taking issue)², thereby squandering the precious resource of this Court's time and attention.

²See *Agins v. City of Tiburon* (1980) 447 US 255; *San Diego Gas & Elec. Co. v. City of San Diego* (1981) 450 US 621; *Williamson County Reg. Plan Comm. v. Hamilton Bank* (1985) ___ US ___, 87 L Ed 2d 126.

THIS CASE WAS DISMISSED BECAUSE OF AGINS, NOT BECAUSE THE LOWER COURTS SAW ANY THEORETICALLY AVAILABLE USE.

Both lower courts assumed (as they were legally required to [see fn 1]) that the County's regulations prevented all viable use. Dismissal and affirmance were ordered *solely* because they felt powerless to ignore a decision of the California Supreme Court without express direction from this Court to do so.

The trial court:

"However a careful rereading of the *Agins* case persuades the Court that when an ordinance, even a non-zoning ordinance, deprives a person of the total use of his lands, his challenge to the ordinance is by way of declaratory relief or possibly mandamus." (App D, p A26)

The Court of Appeal:

"We conclude that because the United States Supreme Court has not yet ruled on the question of whether a state may constitutionally limit the remedy for a taking to nonmonetary relief, this court is obligated to follow *Agins*." (App A, p A16)

AN "ACCESSORY" USE WITHOUT A PRINCIPAL USE IS NO USE AT ALL.

The County's entire argument is, at best, sophistry; at worst, it is an attempt to mislead the Court.

The County expresses no disagreement with any of the legal precepts set out in the Jurisdictional Statement or any of the reasons why it is important for this Court to critically examine California's cavalier treatment of the rights of its property-owning citizens.

Rather, says the County, there is no need to review *this* case because First Church is not prevented from constructing buildings. As the County puts it (quoting its regulation), First Church may construct " . . . accessory buildings and structures . . . " (Motion, p 3; emphasis added.)

True enough.

But that "analysis" skips a step. What are " . . . accessory buildings and structures . . . "? The answer is provided by Los Angeles County Code §22.08.010:

" 'Accessory building or structure' means a detached *subordinate* building or structure, the use of which is customarily *incidental to that of the main building* or to the main use of the land, and which is located in the same or a less restrictive zone, and on the same lot or parcel of land with the main building or use." (Emphasis added.)

By this definition, the County's argument evaporates. The only buildings First Church may construct are those whose use is " . . . subordinate . . . " and " . . . incidental to that of the *main* building . . . " (Emphasis added.) But First Church is forbidden to construct any " . . . main . . . " buildings. That is the gravamen of the complaint.

There is no substance to the County's position. Saying that First Church may build accessory buildings when there can be no main building for the " . . . accessory . . . " to be " . . . incidental to . . . " is a concession that no use at all is permitted.

CONCLUSION

Californians are in urgent need of a decisive ruling from this Court on the regulatory taking issue. As the

Court of Appeal in this case made clear (App A, p A16), there will be no change in California without clear direction from this Court.

The County's motion shows no need for the Court to stay its hand in this case. The issue is clear and properly presented. First Church prays that probable jurisdiction be noted.

Respectfully submitted,

JERROLD A. FADEM

MICHAEL M. BERGER

of FADEM, BERGER & NORTON

By: MICHAEL M. BERGER

Attorneys for Appellant

FIRST ENGLISH EVANGELICAL

LUTHERAN CHURCH OF GLENDALE

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

"I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on February 20, 1986, I served the within *Appellant's Reply to Motion to Dismiss or Affirm* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

DeWitt W. Clinton,
County Counsel
Douglas M. Elwell,
Senior Dep. County Counsel
648 Hall of Administration
500 West Temple Street
Los Angeles, California 90012

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 20, 1986, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)

JOINT APPENDIX

(5)
No. 85-1199

Supreme Court, U.S.
FILED

AUG 13 1986

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

October Term, 1985

**FIRST ENGLISH EVANGELICAL LUTHERAN
CHURCH OF GLENDALE, a California corporation,**

Appellant,

vs.

COUNTY OF LOS ANGELES, CALIFORNIA,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SEVEN

JOINT APPENDIX

**JERROLD A. FADEM
MICHAEL M. BERGER ***
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Principal Deputy County Counsel
DOUGLAS W. ELWELL,
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JACK R. WHITE *
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APPEAL DOCKETED JANUARY 15, 1986
PROBABLE JURISDICTION NOTED JUNE 30, 1986

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
02/21/79:	COMPLAINT FILED
08/22/79:	AMENDED COMPLAINT FILED
09/28/79:	MOTION TO STRIKE FILED
11/01/79:	MOTION TO STRIKE ARGUED
11/15/79:	MOTION TO STRIKE ALLEGATIONS OF REGULATORY TAKING GRANTED
12/26/79:	ANSWER TO AMENDED COMPLAINT FILED

01/05/81: ORDER FILED GRANTING LEAVE TO
FILE SECOND AMENDED COMPLAINT
AND STRIKING ALLEGATIONS OF
REGULATORY TAKING

01/05/81: SECOND AMENDED COMPLAINT
FILED

03/19/81: ANSWER TO SECOND AMENDED
COMPLAINT FILED

02/07/83: TRIAL OF ISSUES UNRELATED TO
THIS APPEAL BEGINS

04/14/83: JUDGMENT FILED

06/03/83: NOTICE OF APPEAL TO CALIFORNIA
COURT OF APPEAL FILED

06/25/85: OPINION OF CALIFORNIA COURT OF
APPEAL FILED

07/25/85: PETITION FOR REHEARING DENIED
BY CALIFORNIA COURT OF APPEAL

10/17/85: PETITION FOR REVIEW DENIED BY
CALIFORNIA SUPREME COURT

01/09/86: NOTICE OF APPEAL TO U.S. SUPREME
COURT FILED

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Telephone (213) 451-9951
Attorneys for Plaintiff

**SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

**FIRST ENGLISH EVANGELICAL)
LUTHERAN CHURCH OF GLENDALE)
a California corporation,)
Plaintiff,)
vs.)
COUNTY OF LOS ANGELES,)
CALIFORNIA and LOS ANGELES)
COUNTY FLOOD CONTROL DISTRICT,)
Defendants.)**

No. C 273 634

SUMMONS ISSUED

FILED

AUG 22 1979

John J. Corcoran, County Clerk
By E. Dill, Deputy

**AMENDED COMPLAINT FOR
INVERSE CONDEMNATION**

Plaintiff alleges:

The Parties

1

The plaintiff is the First English Evangelical Lutheran Church of Glendale (First Church), a California corporation.

2

The defendants are:

- The County of Los Angeles (the County), organized and operating under the laws of the State of California, sometimes acting through its Road Department (the Road Department); and
- the Los Angeles County Flood Control District (Flood Control), a body corporate and politic, created by the Los Angeles County Flood Control Act.

Lutherglen

3

First Church owns real and personal property, a conference center and a camp, known as Lutherglen (Lutherglen), at 23200 Angeles Forest Highway, Palmdale, California.

4

Lutherglen is located in a canyon in the Hidden Springs area of the Angeles National Forest. The bottom of the canyon is a natural drainage channel for water flowing from the mountains above that canyon. The canyon is part of Flood Control's Mill Creek Flood Protection Area.

The Filing of A Claim

5

Though no claim is required for inverse condemnation actions under Govt. Code §905.1, First Church complied with the provisions of Govt. Code §900, et seq., by following the claim procedures described therein, as follows:

- A. A claim for damages was timely filed with the County and Flood Control on May 17, 1979; and
- B. the County and Flood Control denied First Church's claim on August 22, 1978.

FIRST CAUSE OF ACTION

(Against the County, the Road Department
and Flood Control for Inverse Condemnation)

6

First Church incorporates by reference Paragraphs 1 through 5 above.

The Road

7

The Road Department constructed and maintained Angeles Forest Highway (the road) across the canyon, upstream from Lutherglenn.

The road is a County road.

The road, where it crossed the canyon bottom, was solid, except for two culverts for water flowing under the roadway.

On July 24 through July 27, 1977, there was a forest fire (the Middle Fire) in the drainage area tributary to the road and the culverts.

After the Middle Fire, the United States Forest Service warned Flood Control that the Middle Fire had created an increased danger of flood because of accelerated erosion and siltation from the burned area.

On August 4, 1977, Flood Control prepared a memorandum, Exhibit A hereto, concerning the flood danger to Lutherglenn and neighboring properties.

The August 4, 1977 Memorandum, Exhibit A, reports:

"... [F]looding will be a problem in the event of high intensity rainfall. Existing corrugated metal culverts under Angeles Forest Highway may plug and cause various portions of the Highway to become impassable to motorists."

The August 4, 1977 report says Lutherglenn is endangered by such flooding, as follows:

"In the event of heavy or prolonged rainfall, significant hazards will exist... people living in the canyon bottom or using the campgrounds will run the risk of being caught in a flooding situation."

Despite the known danger, Flood Control and the Road Department failed to construct adequate flood protection facilities to allow the flood water runoff to flow past the road.

The Road Department had negligently designed the road so the culverts were of inadequate size to accommodate runoff flowing down the canyon during a major storm. Instead, they became clogged with mud and debris which heavy flows always carry.

The Road Department negligently failed to maintain the culverts by allowing debris to block the culverts.

On February 9, 1978, as a proximate result of Flood Control's failure to provide flood protection and the Road Department's negligent design and negligent maintenance of the culverts, water ceased to flow under the road, and the flow collected upstream from the road, which then functioned as though it were a dam.

As pressure from the water collecting behind the road increased, the road partially collapsed and released a massive wall of water, mud and debris which rushed down the canyon and inundated Lutherglen

Without the negligence of the Road Department and Flood Control, no flow of like magnitude to what was experienced would have occurred.

Loss of Lutherglen

8

The inundation by water, mud, and debris proximately caused damage as follows:

- The private bridge which connected Lutherglen properties on the two sides of the canyon was washed away and destroyed;
- the Lutherglen meeting hall and kitchen, dormitory, swimming pool, recreational facilities, water supply lines and landscaping were destroyed by the flood waters;
- trailers used as living quarters by the Lutherglen staff were washed away and destroyed;
- the contents of the Lutherglen buildings were carried away by flood water and destroyed or damaged;
- First Church has lost the use of Lutherglen; and

- the market value of Lutherglen is substantially reduced.

9

First Church has suffered damage in excess of \$200,000.00; the exact amount of that damage is not yet known.

10

Lutherglen and First Church's personal property have been taken and damaged by Flood Control and the Road Department for public use without payment of compensation, contrary to Art. 1, §19 of the California Constitution.

The Ordinance

11

On January 11, 1979, the County adopted Ordinance No. 11,855, which provides:

"Section 1. A person shall not construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be, located within the outer boundary lines of the interim flood protection area located in Mill Creek Canyon, vicinity of Hidden Springs, as shown on Map No. 63 ML 52, attached hereto and incorporated herein by reference as though fully set forth."

12

Lutherglen is within the flood protection area created by Ordinance No. 11,855.

13

Ordinance No. 11,855 denies First Church all use of Lutherglen.

SECOND CAUSE OF ACTION

(Against Flood Control for Damages
From An Ultrahazardous Activity
and For Inverse Condemnation)

14

First Church incorporates by reference Paragraphs 1 through 5 above.

The Cloud Seeding

15

Flood Control undertook to seed clouds to produce more rainfall during the winter of 1977 and 1978.

16

Cloud seeding is an ultrahazardous activity, because cloud seeding's potential for harm is great and little is known about its control.

17

On February 9, 1978, there was a major rainstorm in Hidden Springs. Notwithstanding the heavy rains already falling from the February 9, 1978 storm, Flood Control continued to seed the rainstorm after the heavy rains began.

18

The cloud seeding by Flood Control, during a major storm over metropolitan Los Angeles, is an ultrahazardous activity, because:

- There is potential for great harm through flood;
- there is inadequate predictability of the affects (sic) of cloud seeding, making it difficult to reduce or eliminate the flood risk;
- cloud seeding is not commonly done; and
- cloud seeding is inappropriate over metropolitan Los Angeles, particularly during a major storm.

19

Flood Control's cloud seeding contributed to the amount and intensity of the storm in Hidden Springs beyond what would have occurred naturally.

The amount and intensity increased the flood, debris flow and sedimentation.

The increased flood, debris flow and sedimentation contributed (sic) to the collapse of the road.

Loss of Lutherglenn

20

The collapse of the road contributed to inundation by water, mud, and debris which proximately caused damage as follows:

- The private bridge which connected Lutherglenn properties on the two sides of the canyon was washed away and destroyed;
- the Lutherglenn meeting hall and kitchen, dormitory, swimming pool, recreational facilities, water supply lines and landscaping were destroyed by the flood waters;
- trailers used as living quarters by the Lutherglenn staff were washed away and destroyed;

- the contents of the Lutherglenn buildings were carried away by flood water and destroyed or damaged;
- First Church has lost the use of Lutherglenn; and
- the market value of Lutherglenn is substantially reduced.

21

First Church has suffered damage in excess of \$200,000.00; the exact amount of that damage is not yet known.

22

Lutherglenn and First Church's personal property have been taken and damaged by Flood Control for public use without compensation, contrary to Art. 1, §19 of the California Constitution.

WHEREFORE, First Church prays for:

- Damages, including loss of use of Lutherglen, according to proof;
- Attorneys' fees and costs, according to proof; and
- Such other relief as the Court deems just.

FADEM, BERGER & NORTON

/s/ RICHARD D. NORTON
RICHARD D. NORTON
Attorneys for Plaintiff

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COUNTY OF LOS ANGELES

**SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

(TITLE OMITTED IN PRINTING)

FILED
SEPT 28 1979

John J. Corcoran, County Clerk
/s/ , Deputy

NO. C 273-634
NOTICE OF MOTION TO STRIKE;
MOTION TO STRIKE; AND
MEMORANDUM OF POINTS AND
AUTHORITIES

Date: October 15, 1979
Time: 9:00 A.M.
Dept.: 81

TO PLAINTIFF, FIRST ENGLISH EVANGELICAL
LUTHERAN CHURCH OF GLENDALE, AND THEIR
ATTORNEYS OF RECORD, FADEM, BERGER &
NORTON:

PLEASE TAKE NOTICE THAT the hearing on the Motion to Strike of defendant, COUNTY OF LOS ANGELES, to plaintiff's Complaint has been set for October 15, 1979, at 9:00 A.M. or as soon thereafter as the matter may be heard, in Department 81 of the above entitled court, located at 111 North Hill Street, Los Angeles, California.

This Motion to Strike will be based upon this Notice of Motion, the attached Motion, and Points and Authorities in support thereof, and all pleadings and other documents filed herein.

The grounds for the Motion to Strike, and the applicable portions of the Complaint relevant thereto, are as follows:

1. To strike the First Cause of Action, for failure to comply with Rule 1C of the Superior Court's Law and Motion policy, which requires that each cause of action in a Complaint be identified specifically as both its nature and the particular defendants; specifically, that the first cause of action contains two separate and distinct causes of action, one relating to the maintenance of the adequate flood protection facilities (pages 4-8, of the Complaint herein) and a separate distinct cause of action based upon the County ordinance (page 8, line 17 through page 9).

2. To strike the second cause of action for failure to comply with Rule 1C of the Superior Court's Law and Motion policy, in that it states two separate causes of

action, one for ultra-hazardous activity, and another for inverse condemnation, to which the defendant herein has distinct defenses as a matter of law, requiring the separate statement of each cause of action.

3. To strike the allegations at page 8, line 17, through page 9, as being irrelevant to a cause of action herein.

4. To strike Exhibit "A" to the Complaint herein, on the grounds that is evidentiary.

MOTION TO STRIKE

Defendant County of Los Angeles moves to strike, for the reasons set as set forth hereinafter, the following portions of the Complaint herein;

1. To strike the First Cause of Action, for failure to comply with Rule 1C of the Superior Court's Law and Motion policy, which requires that each cause of action in a Complaint be identified specifically as both its nature and the particular defendants; specifically, that the first cause of action contains two separate and distinct causes of action, one relating to the maintenance of the adequate flood protection facilities (pages 4-8, of the Complaint herein) and a separate distinct cause of action based upon the County ordinance (page 8, line 17 through page 9).

2. To strike the second cause of action for failure to comply with rule 1C of the Superior Court's Law and Motion policy, in that it states two separate causes of action, one for ultra-hazardous activity, and another for inverse condemnation, to which the defendant herein has distinct defenses as a matter of law, requiring the separate statement of each cause of action.

3. To strike the allegations at page 8, line 17, through page 9, as being irrelevant to a cause of action herein.

4. To strike Exhibit "A" to the Complaint herein, on the grounds that it is evidentiary.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

PLAINTIFF'S FIRST CAUSE OF ACTION FAILS TO COMPLY WITH RULE 1C OF THE LAW AND MOTION POLICY OF THIS COURT.

Plaintiff's first cause of action contains two separate and distinct sets of allegations. The first set of allegations are found on pages 4 through 8, line 10, of the Complaint herein, and relate to activities of the County Road Department and Flood Control District regarding adequate flood protection for the maintenance of the Angeles Crest

Highway. The totally unrelated allegations beginning on page 8, line 17, through page 9, of the Complaint herein pertain to a County ordinance which prohibits construction in the area of the Millcreek Flood Protection area, which includes plaintiff's property. It is clear that these two sets of allegations are entirely unrelated, and would state two separate causes of action, if any. In order for this defendant to properly answer, or demurrer, (sic) to the Complaint herein, it is necessary to separately state each unrelated set of allegations. Defenses available to this defendant regarding the flooding of plaintiff's property, are entirely distinct from defenses to be plead by this defendant regarding the Ordinance. By indiscriminately mixing these allegations, defendant herein is prejudiced by being unable to separately plead and object via demurrer, to these distinct allegations. The Motion to Strike, therefore, should be granted in this regard.

II.

THE COMPLAINT HEREIN CONTAINS ALLEGATIONS WHICH SHOULD BE STRICKEN.

Beginning at Page 8, line 17, through Page 9 of the Complaint herein, there are allegations regarding the County Ordinance prohibiting reconstruction in the Mill Creek Flood Protection area, which have no bearing to any cause of action herein. It is alleged that a particular

ordinance adopted by the County, prohibits the use of plaintiff's property in any manner. These allegations are entirely immaterial and irrelevant and have no bearing upon any conceivable cause of action herein.

In the landmark decision in *Agins v. City of Tiburon* (1979) 24 Cal.3d 266, 269-70, the California Supreme Court explicitly held that a zoning ordinance which substantially limits the use of the plaintiff's property, may not provide a basis for the recovery of damages on the theory of inverse condemnation. The *Agins* decision stands squarely for the proposition that such an Ordinance must be attacked through the remedy of declaratory relief or mandamus. No cause of action for damages can arise therefrom. Therefore, the allegations regarding this ordinance are entirely immaterial to the action herein, and should be properly stricken from the Complaint.

III.

EXHIBIT "A" TO THE COMPLAINT CONSTITUTES EVIDENTIARY MATTER WHICH SHOULD BE STRICKEN.

It is well established that evidentiary matters contained in a Complaint are subject to a Motion to Strike. (49 Cal.Jur.3d "Pleading", Section 303, page 785, Footnote 49.) Exhibit "A" to the Complaint herein clearly constitutes evidentiary material being a memorandum of the Los Angeles County Flood Control District, and should be stricken.

IV.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the Motion to Strike the Complaint herein be granted.

DATED: September 28, 1979

Respectfully submitted,

JOHN H. LARSON
County Counsel

By /s/WILLIAM S. WALTER
WILLIAM S. WALTER
Deputy County Counsel

Attorneys for defendant
COUNTY OF LOS ANGELES

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES**

DEPT. 81

DATE November 15, 1979
HONORABLE Leon Savitch
HONORABLE
21

Judge
Judge Pro Tem
Deputy Sheriff

C.J. Longe
None

Deputy Clerk
Reporter

(Parties and counsel checked if present)

C 273 634
First English Evangelical Lutheran
Church of Glendale, etc.,
vs
L.A. County Flood Control District

NATURE OF PROCEEDINGS.

Demurrer of defendants,
County of L.A. and L.A.
County Flood Control
District, to plaintiff's
complaint

Matter, heretofore submitted
on November 1, 1979, is
now determined.

Motion of the above
defendants, to strike

The Court has carefully re-
examined the *Tri-Chem* and
Schaeffer cases and some of
the cases cited by plaintiff. The Court cannot say as a
matter of law that there is no duty on the part of defendants

to plaintiff which gives rise to a cause of action for negligence and inverse condemnation. Rather, as expressed by Justice Kaus in the *Tri-Chem* case, there is a limited duty "to not making things worse." This Court believes that the allegations on lines 23 through 29 on page 5 and lines 2 through 15 on page 6, and particularly lines 13 through 15 on page 6, allege that limited duty.

However a careful rereading of the *Agin* case persuades the Court that when an ordinance, even a non-zoning ordinance, deprives a person of the total use of his lands, his challenge to the ordinance is by way of declaratory relief or possibly mandamus.

Therefore, the Court: (i) overrules the demurrer to the Amended Complaint; and (ii) grants the motion to strike the allegations beginning on page 8, line 17 through page 9; Defendant has 30 days to answer the Amended Complaint.

A copy of this order is sent via U.S. mail to counsel.

21 DEPT. 81 MINUTES ENTERED
November 15, 1979
COUNTY CLERK

Law Offices
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Telephone (213) 451-9951
Attorneys for the Plaintiff
First English Evangelical
Lutheran Church of Glendale

**SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

(TITLE OMITTED IN PRINTING)

No. C 273 634
July 31, 1980
9:00 A.M.
Department 31

FILED
JUL 28, 1980
John J. Corcoran, County Clerk
By /s/ Deputy

**MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
MOTION TO CONTINUE TRIAL AND
DECLARATION OF RICHARD D. NORTON**

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MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO CONTINUE TRIAL

INTRODUCTION

Los Angeles County (the County) and the Los Angeles County Flood Control District (the District) want to delay trial because:

- They say their lawyer is not ready; and
- they say their witnesses are not ready.

The First English Evangelical Lutheran Church of Glendale (First Church) believes justice is best served by a trial now.

The claimed unpreparedness of the County and the District is imagined.

A Little Background

This case is about flood damage which occurred 2 1/2 years ago, on February 9 - 10, 1978, to Lutherglen Camp, which is owned by First Church and located in the Hidden Springs area of Angeles National Forest.

There are 3 other lawsuits pending against the County and the District for flood damage in the Hidden Springs area:

1. *Acosta v. County of Los Angeles*,
No. C 271 286;

2. *Hidden Springs, Inc. v. County of Los Angeles*, No. NEC 26146; and
3. *Hodges v. County of Los Angeles*, No. NEC 24655.

First Church's case is the smallest of those, because the others include death claims. This case is for about \$200,000.00 property damage.

The County Counsel's claim to be unprepared is surprising. The attention that the Hidden Springs' flood cases have received is documented in the lead story from the Los Angeles Daily Journal of June 4, 1980 (Exhibit 1).

The County Counsel Can Be Ready On Time

The County Counsel claims unpreparedness.

At present, two lawyers, William S. Walter and Arnold K. Graham, are working on this case for the County and the District.

Mr. Graham is, by his own description, an experienced trial lawyer, who looks forward to the trial of this case.

Mr. Graham has already attended 7 depositions in this case.

Mr. Graham is certainly able to be ready for the August 11, 1980 trial.

The County's Experts' Preparation

As shown in the accompanying declaration of Richard D. Norton, the County's experts were engaged before April 1980.

Those experts have had 4 months to analyze the County's liability.

The 351 Interrogatories

The County and the District argue First Church's answers to Interrogatories are a reason to delay trial.

The facts need to be examined.

The County and the District served a total of 139 pages of Interrogatories. When subparts are counted, there were more than 351 individual inquiries.

First Church's answers to those Interrogatories were received by the County and the District on July 16, 1980.

First Church's 52 pages of Interrogatory answers are factual and forthcoming.

It is hard to see how the County and the District can claim prejudice.

The County Understands the Case

On March 31, 1980, a pretrial conference was conducted before this Court.

The County and the District discussed the issues for a pretrial conference order signed by this Court.

The County and the District cannot now claim not to know the issues for this trial.

The County and the District have, for 2 1/2 years, refused to compensate First Church or permit rebuilding.

First Church believes additional delay would be unjust.

Respectfully submitted,
FADEM, BERGER & NORTON

/s/ RICHARD D. NORTON
RICHARD D. NORTON
Attorneys for the Plaintiff,
First English Evangelical
Lutheran Church of Glendale

DECLARATION OF RICHARD D. NORTON

RICHARD D. NORTON declares:

I am an attorney for the First English Evangelical Lutheran Church of Glendale (First Church).

I have personal knowledge of the following facts and, if called as a witness, can testify competently to those facts.

On April 21, 1980, I met with John Dracup, a civil engineer, at the Orange County Superior Court, to discuss Mr. Dracup's work on another case.

At that time, Mr. Dracup informed me he had, several weeks earlier, been retained by Los Angeles County (the County) and the Los Angeles County Flood Control District (the District) to act as their expert witness in the lawsuit brought by First Church against the County and the District.

Mr. Dracup also told me the County and the District had previously retained other expert witnesses to testify on issues of sedimentation and meteorology.

I declare under penalty of perjury the foregoing is true and correct.

Executed July 28, 1980, Santa Monica, California.

/s/ RICHARD D. NORTON
RICHARD D. NORTON

EXHIBIT 1

LOS ANGELES DAILY JOURNAL

Wednesday, June 4, 1980
210 South Spring Street, Phone (213) 625-2141

COUNTY ANTICIPATES LOSING TEN
\$1 MILLION-PLUS CASES

Budget Memo by Head of Litigation Details "Heavy Exposure" Personal Injury, Wrongful Death Cases Pending for Fiscal '81

By Gail Diane Cox

A county crossing guard waves a little girl across the street, where she is hit by a car.

A professor writes county officials trying to get the speed limit on an old road reduced, and a decade later on the same road a pickup truck collides head-on with a van carrying the professor.

Sheriff's deputies jail a "drunk" who turns out to be a retired businessman having a stroke.

In each of these and seven other cases, Los Angeles County government's head of litigation anticipates the county will pay more than one million dollars during the coming fiscal year.

Litigation head Peter Krichman's Feb. 5 memo to budget planners is titled "Heavy Exposure." It lists ten damage suits against the county "in which there is a good chance that liability will be established" with "probable settlements or judgments in excess of one million dollars."

Deputy County Counsel Charles Tackett, set to defend the county road department in four of the cases, told The Daily Journal, "If government is going to be the insurer of last resort, that's okay. But let's not ease into this through court decisions. Let's put it out in the open and see if that's what the taxpayers decide they really want."

Predictably, the attorney scheduled to go against Tackett in behalf of the professor who was injured sees county liability differently. Edward Steinbrecher maintains there are patterns of accidents that should alert county officials, especially those in the road department, to the need for changes.

"By not posting signs ...and by going before a jury instead of settling, the county is paying out far more than it should have to," he said.

The Feb. 5 county memo estimates the case, *Chambers v. County of Los Angeles*, will cost as much as \$1.5 million in damages (sic). It describes the plaintiffs as two UCLA professors who suffered brain damage in the Old Topanga Road accident.

Their attorney offered a correction, saying James Vincent Chambers and his wife are both professors at Pierce College, and they suffered hip and leg damage that requires a live-in nurse.

But Steinbrecher agrees with the county on one point.

"It's a slam-dunk case," he said.

Like *Chambers*, *Kearns v. County of Los Angeles* is a "heavy exposure" case involving a vehicle crossing a center line. But here the county memo estimates the loss will be two million dollars.

The 1978 accident took place on Fullerton Road. All parties agree the plaintiff, a housewife in her late thirties, suffered severe brain damage.

"She is totally dependent now," said Nancy Kearns' attorney John Taves in a telephone interview. "In addition to \$1.4 million actual costs, we are asking for loss of love, affection, consortium, and family care. She has a husband and one minor child."

Taves said the company insuring the other car, a Cadillac that pinned Kearns' Toyota against a concrete wall, has already settled with him for \$1.2 million. County liability enters into the picture because the Cadillac allegedly went out of control after hitting a defect in the road.

Both *Kearns* and another damage case against the county, *Perlberg v. County of Los Angeles*, are set for trial later this month.

Notwithstanding recent publicity about possible use of excessive force by law enforcement officers, *Perlberg* is the only one of the ten cases springing from the county sheriff's department.

"Plaintiff, a screenwriter, was arrested and incarcerated by the sheriff's department. Deputies thought the plaintiff was drunk, whereas in fact the plaintiff had suffered a stroke and received no medical attention while in jail," says the county's case description.

"That's exactly what happened, except Irving Perlberg isn't a screenwriter," said his attorney, Ed Cummings of Meserve, Mumper and Hughes.

"I think he was in the garment business in New York, but he's retired now in Marina del Rey. He was in a supermarket when he got sick, and went to sit in his car. They arrested him there. He spent 17 hours in jail, with results that he is still substantially suffering today."

Cummings added that he has rejected a settlement for an undisclosed amount. Here, the county estimates it will lose one million dollars.

However, the county budget planners are being told they may get out of another of the ten cases, *Jeffs v. County of Los Angeles*, for less than one million. Litigation head Kirchman (sic) says damages in that road case will probably range from \$750,000 to \$1.25 million.

Plaintiff Jeffs' attorney, Joseph Ryan, was not available for comment. But the county offers this version, "Plaintiff collided with a power pole while driving a vehicle on Culver Boulevard as it intersects Jefferson Boulevard. Two of the occupants of the automobile (sic) were killed and the third occupant has substantial back injuries."

While *Jeffs* is assessed as the least costly of the big ten cases, *Martinez v. County of Los Angeles* has the potential for costing the most. Krichman estimates (sic) it could run as high as three million dollars in personal injury damages.

Jose Martinez was 16-years-old when he was surfing at county-maintained Cabrillo Beach. The county concedes it had posted no warning signs about a submerged sea wall. Martinez hit it, and today is a quadraplegic who is blind in one eye.

In another accident at a county recreational facility, Suzanne Gilstrap was visiting the Arboretum in Arcadia on a school trip when she was struck by a falling limb from a rotting Eucalyptus (sic) tree. Eleven-years-old at the time, she is also now a quadraplegic.

Her parents' lawsuit is carried by attorney Michael Moorhead of Magana, Cathcart, McCarthy and Pierry. County predictions are that *Gilstrap v. Los Angeles County* will cost taxpayers \$2.3 million in damages.

Cummings v. Bourke, et al was brought by the parents of an eight-year-old girl, and the county estimates damages will be between one and one and a half million dollars.

"(She) was in a crosswalk on her way to school and was waved across the street by the crossing guard, a county employee, and then struck by an oncoming vehicle," says the county summary. "Plaintiff sustained brain damage and she is mentally (sic) retarded."

One young woman died and three were injured in the heavy exposure case that has been consolidated under the name *Elinor Barbour v. County of Los Angeles*. Lead plaintiff's attorney, Mark Meyers, told The Daily Journal he is frankly puzzled by the county's pre-trial behavior.

"I've got county files showing other accidents on Mulholland and I'm still not through reading them, but the county doesn't seem to be doing any discovery," he said.

He said the Las Virgenes Water District, co-defendants, have been equally quiet.

It was a water district dump truck that collided with the young women's Jaguar at the corner of Mulholland Boulevard and Las Virgenes. Both sides agree damages will be heightened by the women's being all-American volleyball players.

"For example, that crash ended the career of girl who was at UCLA on a basketball scholarship," said Meyers.

For *Barbour*, the county expects to pay out "in excess of one million dollars."

A county-maintained intersection also figures in *Long v. County of Los Angeles*. The county version says, "Plaintiff's motorcycle was hit by a van at an intersection controlled by a stop sign on Telegraph Road. Plaintiff alleges that the angle of the intersection made it impossible for the van to see the motorcycle."

"It wasn't just the angle," counters plaintiff's attorney Rodney E. Moss.

"There's no signal there, the speed limit is too high -- Many factors make that intersection dangerous," he continued, adding that his client, motorcyclist Richard Long, is residing at Rancho Los Amigos Hospital with brain damage.

Here too the county anticipates losing more than one million dollars.

Unique among the plaintiff's attorneys interviewed by The Daily Journal was Mark Kadzielski, who is preparing for an August trial-setting conference on *Hidden Springs v. Flood Control District of Los Angeles County*. Kadzielski saw little import in his case making the county's list.

"Perhaps they put us there because our prayer is so high," said Kadzielski. He said his four causes of action total more than \$20 million. The county memo says his clients, a widow and her three daughters, are likely to win one million.

"I suspect the county is less worried about us, per se, than they are about the whole cloud-seeding episode," Kadzielski suggested.

On Feb. 10, 1978, following cloud-seeding by the county, floods hit the Hidden Springs resort area in the Angeles Forest, killing 43-year-old Gaylon Hinterberg, his 16-year-old son, and eight others.

Kadzielski, who represents only the surviving Hinterbergs and the family's estate, said he knew of just one other wrongful death suit that grew out of the flooding.

Both sides agree the trial will take up not only the efficacy of cloud-seeding, but the adequacy of the drainage system designed, constructed, and maintained by the county flood control district.

While the above ten lawsuits are expected to be the most dramatic losses in the coming year, County Counsel John

Larson reports that the number of cases seeking money damages against the county and its special districts has increased in the last year from 1,139 to 1,311.

In his budget message to Chief Administrative Officer Harry Hufford, Larson blames the 15 percent increase on factors ranging from the general litigiousness of society to a public perception that government has a "deep pocket" with no limit on its liability.

"However," according to Larson, "the greatest single cause of this increase in damage litigation has come from the decisions of the appellate courts, and particularly the California Supreme Court, reflecting its philosophy that all persons who are injured should be made whole with little, if any, regard to their fault and that the risk of their injuries should be spread over the public and paid for by government."

Larson's budget message did not describe any of the above cases.

It did describe recent case law as "unrealistic and unworkable." Larson predicted further increases in filings against the county.

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Attorneys for Plaintiff
First English Evangelical
Lutheran Church of Glendale

**SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

(TITLE OMITTED IN PRINTING)

No. C 273 634

FILED

JAN 5 1981

John J. Corcoran, County Clerk
By Connie L. Brown, Deputy

**SECOND AMENDED COMPLAINT
FOR INVERSE CONDEMNATION**

Plaintiff alleges:

The Parties

1

The plaintiff is the First English Evangelical Lutheran Church of Glendale (First Church), a California corporation.

2

The defendants are:

- The County of Los Angeles (the County), organized and operating under the laws of the State of California, sometimes acting through its Road Department (the Road Department); and
- the Los Angeles County Flood Control District (Flood Control), a body corporate and politic, created by the Los Angeles County Flood Control Act.

Lutherglen

3

First Church owns real and personal property, a conference center and a camp, known as Lutherglen (Lutherglen), at 23200 Angeles Forest Highway, Palmdale, California.

4

Lutherglen is located in a canyon in the Hidden Springs area of the Angeles National Forest. The bottom of the canyon is a natural drainage channel for water flowing from the mountains above that canyon. The canyon is part of Flood Control's Mill Creek Flood Protection Area.

The Filing of A Claim

5

Though no claim is required for inverse condemnation actions under Govt. Code §905.1, First Church complied with the provisions of Govt. Code §900, et seq., by following the claim procedures described therein, as follows:

- A. A claim for damages was timely filed with the County and Flood Control on May 17, 1979; and
- B. the County and Flood Control denied First Church's claim on August 22, 1978.

FIRST CAUSE OF ACTION

(Against the County, the Road Department,
and Flood Control for Inverse Condemnation)

6

First Church incorporates by reference Paragraphs 1 through 5 above.

The Road

7

The Road Department constructed and maintained Angeles Forest Highway (the road) across the canyon, upstream from Lutherglen.

The road is a County road.

The road, where it crossed the canyon bottom, was solid, except for two culverts for water flowing under the roadway.

On July 24 through July 27, 1977, there was a forest fire (the Middle Fire) in the drainage area tributary to the road and the culverts.

After the Middle Fire, the United States Forest Service warned Flood Control that the Middle Fire had created an increased danger of flood because of accelerated erosion and siltation from the burned area.

On August 4, 1977, Flood Control prepared a memorandum, Exhibit A hereto, concerning the flood danger to Lutherglen and neighboring properties.

The August 4, 1977 Memorandum, Exhibit A, reports:

"... [F]looding will be a problem in the event of high intensity rainfall. Existing corrugated metal culverts under Angeles Forest Highway may plug and cause various portions of the Highway to become impassable to motorists."

The August 4, 1977 report says Lutherglen is endangered by such flooding, as follows:

"In the event of heavy or prolonged rainfall, significant hazards will exist ... people living in the canyon bottom or using the campgrounds will run the risk of being caught in a flooding situation."

Despite the known danger, Flood Control and the Road Department failed to construct adequate flood protection facilities to allow the flood water runoff to flow past the road.

The Road Department had negligently designed the road so the culverts were of inadequate size to accommodate runoff flowing down the canyon during a major storm. Instead, they became clogged with mud and debris which heavy flows always carry.

The Road Department negligently failed to maintain the culverts by allowing debris to block the culverts.

On February 9, 1978, as a proximate result of Flood Control's failure to provide flood protection and the Road Department's negligent design and negligent maintenance of the culverts, water ceased to flow under the road, and the flow collected upstream from the road, which then functioned as though it were a dam.

As pressure from the water collecting behind the road increased, the road partially collapsed and released a massive wall of water, mud and debris which rushed down the canyon and inundated Lutherglenn

Without the negligence of the Road Department and Flood Control, no flow of like magnitude to what was experienced would have occurred.

The County, The Road Department and
Flood Control Are Liable For The
Damage Caused By The Dangerous Condition
of Their Property

8

Government Code §835 makes a public entity liable for damage caused by a dangerous condition of its property if the public entity had notice of the dangerous condition in sufficient time before the damage occurred to take measures to protect against the dangerous condition.

9

The Road Department and Flood Control had control of the Middle Fork of Mill Creek (Middle Fork) channel. The Road Department deepened and widened the Middle Fork upstream of the road after the Middle Fire. Flood Control is responsible for protecting the Middle Fork from flood, as described in Water Code App. §28.1 (Los Angeles County Flood Control Act).

10

The Road Department and Flood Control had notice a dangerous condition existed after the Middle Fire, where the road crossed the Middle Fork.

11

Despite the known dangerous condition on its property, Flood Control failed to remedy the dangerous condition.

12

The Road Department failed to warn of the dangerous condition that existed on property controlled by the Road Department and Flood Control.

Loss of Lutherglenn

13

The inundation by water, mud and debris proximately caused damage as follows:

- The private bridge which connected Lutherglenn properties on the two sides of the canyon was washed away and destroyed;
- the Lutherglenn meeting hall and kitchen, dormitory, swimming pool, recreational facilities, water supply lines and landscaping were destroyed by the flood waters;

- trailers used as living quarters by the Lutherglen staff were washed away and destroyed;
- the contents of the Lutherglen buildings were carried away by flood water and destroyed or damaged;
- First Church has lost the use of Lutherglen; and
- the market value of Lutherglen is substantially reduced.

14

First Church has suffered damage in excess of \$200,000.00; the exact amount of that damage is not yet known.

15

Lutherglen and First Church's personal property has been taken and damaged by Flood Control and the Road Department for public use without payment of compensation, contrary to Art. 1, §19 of the California Constitution.

The Ordinance

16

On January 11, 1979, the County adopted Ordinance No. 11,855, which provides:

"Section 1. A person shall not construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be, located within the outer boundary lines of the interim flood protection area located in Mill Creek Canyon, vicinity of Hidden Springs, as shown on Map No. 63 ML 52, attached hereto and incorporated herein by reference as though fully set forth."

17

Lutherglen is within the flood protection area created by Ordinance No. 11,855.

18

Ordinance No. 11,855 denies First Church all use of Lutherglen.

SECOND CAUSE OF ACTION

(Against Flood Control for Damages
From An Ultrahazardous Activity
and For Inverse Condemnation)

19

First Church incorporates by reference Paragraphs 1 through 5 above.

The Cloud Seeding

20

Flood Control undertook to seed clouds to produce more rainfall during the winter of 1977 and 1978.

21

Cloud seeding is an ultrahazardous activity, because cloud seeding's potential for harm is great and little is known about its control.

22

On February 9, 1978, there was a major rainstorm in Hidden Springs. Notwithstanding the heavy rains already falling from the February 9, 1978 storm, Flood Control continued to seed the rainstorm after the heavy rains began.

23

The cloud seeding by Flood Control, during a major storm over metropolitan Los Angeles, is an ultrahazardous activity, because:

- There is potential for great harm through flood;
- there is inadequate predictability of the affects (sic) of cloud seeding, making it difficult to reduce or eliminate the flood risk;
- cloud seeding is not commonly done; and
- cloud seeding is inappropriate over metropolitan Los Angeles, particularly during a major storm.

24

Flood Control's cloud seeding contributed to the amount and intensity of the storm in Hidden Springs beyond what would have occurred naturally.

The amount and intensity increased the flood, debris flow and sedimentation.

The increased flood, debris flow and sedimentation contributed to the collapse of the road.

Loss of Lutherglen

25

The collapse of the road contributed to inundation by water, mud and debris which proximately caused damage as follows:

- The private bridge which connected Lutherglen properties on the two sides of the canyon was washed away and destroyed;
- the Lutherglen meeting hall and kitchen, dormitory, swimming pool, recreational facilities, water supply lines and landscaping were destroyed by the flood waters;
- trailers used as living quarters by the Lutherglen staff were washed away and destroyed;
- the contents of the Lutherglen buildings were carried away by flood water and destroyed or damaged;
- First Church has lost the use of Lutherglen; and
- the market value of Lutherglen is substantially reduced.

26

First Church has suffered damage in excess of \$200,000.00; the exact amount of that damage is not yet known.

27

Lutherglen and First Church's personal property has been taken and damaged by Flood Control for public use without compensation, contrary to Art. 1, §19 of the California Constitution.

WHEREFORE, First Church prays for:

- Damages, including loss of use of Lutherglen, according to proof;
- Attorneys' fees and costs, according to proof; and
- Such other relief as the Court deems just.

FADEM, BERGER & NORTON

/s/ RICHARD D. NORTON
RICHARD D. NORTON
Attorneys for Plaintiff

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES**

DEPT. 34

DATE JANUARY 5, 1981

HONORABLE J. WESLEY REED, Judge

None Deputy Sheriff

C. Brown, Deputy Clerk

B. Quave, Reporter

(Parties and counsel checked if present)

C 273 634 First English Evangelical
Lutheran Church, etc.

vs.

COUNTY OF LOS ANGELES, et al

Counsel for
Plaintiff

FADEM, BERBER (sic) &
NORTON
by: Richard Norton

Counsel for
Defendant

JOHN H. LARSON,
COUNTY COUNSEL
by: Arnold K. Graham, Deputy
Richard D. Weiss, Deputy

NATURE OF PROCEEDINGS:

- I. Trial Setting Conference;
- II. Plaintiff's motion to amend complaint;
- III. Plaintiff's motion for discovery.

Trial is continued to March 23, 1981 at 9:00 a.m. in this department. Counsel for plaintiff indicates his willingness to accept a further continuance at the request of the

defendant, County of Los Angeles. Defendant to give 15 days notice of any such desire to continue trial date.

Motion to compel answers to interrogatories Nos. 31 to 59 is deemed filed and served this date. The defendant shall be allowed time to answer or to object.

Motion to file second amended complaint is granted. The court strikes therefrom paragraphs 16 through 24, inclusive, to conform to previously (sic) rulings of this court.

Defendant announces intention to file Declaration pursuant to 170.6 C.C.P.

DEPT. 34

MINUTES ENTERED
JANUARY 5, 1981
COUNTY CLERK

MINUTE ORDER

JOHN H. LARSON, County Counsel
ARNOLD K. GRAHAM, Deputy County Counsel
648 Hall of Administration
500 West Temple Street
Los Angeles, California 90012
(213) 974-1868
Attorneys for Defendant
COUNTY OF LOS ANGELES

**SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

(TITLE OMITTED IN PRINTING)

FILED

MAR 19 1981

John J. Corcoran, County Clerk
By E. Dill, Deputy

**ANSWER OF DEFENDANT COUNTY
OF LOS ANGELES TO PLAINTIFF'S
UNVERIFIED SECOND AMENDED
COMPLAINT**

Defendant County of Los Angeles answers plaintiff's unverified Second Amended Complaint, and denies generally and specifically each and every allegation contained in each and every cause of action therein, pursuant to Code of Civil Procedure §431.30(d).

AFFIRMATIVE DEFENSES

Defendant County of Los Angeles alleges the following affirmative defenses to the allegations contained in the Second Amended Complaint:

1. FIRST AFFIRMATIVE DEFENSE --

The First Cause of Action fails to state facts sufficient to constitute a cause of action against this defendant.

2. SECOND AFFIRMATIVE DEFENSE --

The First Cause of Action fails to state a cause of action against this defendant as a matter of law.

3. THIRD AFFIRMATIVE DEFENSE --

Plaintiff assumed whatever risk of harm or hazard, if any, which existed at the times and places of the alleged incidents which are the subject of this action.

4. FOURTH AFFIRMATIVE DEFENSE --

Plaintiff was careless and negligent in and about the matters alleged in the complaint which carelessness and negligence proximately caused and contributed to the incidents and injuries, losses and damages complained of in the complaint.

5. FIFTH AFFIRMATIVE DEFENSE --

Any and all acts or omissions of this defendant and its agents or employees which allegedly created the condition of the property which are the subject of this action were reasonable. This defendant is therefore not liable pursuant to Government Code §835.4.

6. SIXTH AFFIRMATIVE DEFENSE --

This defendant had neither actual nor constructive notice of any dangerous condition, if any, which existed at the time and place mentioned in the complaint on file herein, for a sufficient time prior to the alleged injury to have taken protective measures against said condition.

7. SEVENTH AFFIRMATIVE DEFENSE --

Any and all acts or omissions of this defendant, its agents, or employees which allegedly caused or created the condition of property at the times and places of the alleged injuries or damages which are the subject of this action were in accordance with reasonably approved plans, specifications and designs of construction or improvement to public property. Therefore, this defendant is not liable to plaintiff for any of the alleged damages pursuant to Government Code §830.6.

8. EIGHTH AFFIRMATIVE DEFENSE --

Any and all acts or omissions of this defendant, it (sic) agents or employees, which allegedly caused damages at the times and places set forth in the complaint which are the subject of this action, were the exercise of discretion vested in them. Therefore, this defendant is not liable to plaintiff because of the immunity provided by Government Code §820.1.

9. NINTH AFFIRMATIVE DEFENSE --

Any and all alleged acts or omissions which allegedly created the condition at the times and places of the alleged damages which are the subject of this action were caused by third parties. Therefore, this defendant is not liable to plaintiff pursuant to Government Code §820.8

10. TENTH AFFIRMATIVE DEFENSE --

Any and all alleged acts or omissions which allegedly created the condition at the times and places of the alleged damages which are the subject of this action were the result of the natural condition of unimproved property. Therefore, this defendant is not liable to plaintiff for any of the alleged damages pursuant to Government Code §831.2.

11. ELEVENTH AFFIRMATIVE DEFENSE --

This defendant is not liable to plaintiff for any acts or omissions which allegedly caused damages as a result of the issuance or failure to issue a permit, pursuant to the immunities provided by Government Code §818.4.

12. TWELFTH AFFIRMATIVE DEFENSE --

This defendant is not liable to plaintiff for any alleged damages which are the subject of this action which resulted from the defendants' exercise of police powers in the interest of the public health, safety and/or general welfare.

13. THIRTEENTH AFFIRMATIVE DEFENSE --

This defendant is not liable to plaintiff herein for any alleged damages which are subject to this action since any property of this defendant has always been used and maintained pursuant to law.

14. FOURTEENTH AFFIRMATIVE DEFENSE --

This defendant is not liable to plaintiff for any alleged damages which are the subject of this action which are the result of an act of God or other natural phenomena.

WHEREFORE, this defendant prays for judgment as follows:

1. That plaintiff take nothing by reason of its complaint.
2. That defendant recover its costs of suit incurred herein; and
3. That defendant receive such other and further relief as the Court deems just and proper.

Date: March 18, 1981

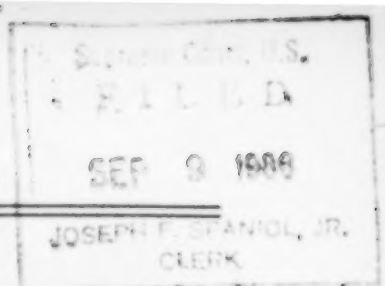
JOHN H. LARSON
County Counsel

/s/ ARNOLD K. GRAHAM
ARNOLD K. GRAHAM
Deputy County Counsel

Attorneys for Defendant
County of Los Angeles

APPELLANT'S BRIEF

No. 85-1199



IN THE
Supreme Court of the United States

October Term, 1985

**FIRST ENGLISH EVANGELICAL LUTHERAN
CHURCH OF GLENDALE, a California corporation,**

Appellant,

vs.

COUNTY OF LOS ANGELES, CALIFORNIA,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SEVEN

BRIEF FOR APPELLANT
First English Evangelical Lutheran Church

**JERROLD A. FADEM
MICHAEL M. BERGER ***
of FADEM, BERGER & NORTON
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501 Santa Monica Boulevard
Post Office Box 2148
Santa Monica, California 90406
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Attorneys for Appellant

*Counsel of Record

APPEAL DOCKETED JANUARY 15, 1986
PROBABLE JURISDICTION NOTED JUNE 30, 1986

12 pgs

QUESTIONS PRESENTED

1. When a local government agency regulates private property in such a way that no economically viable use is left to the owner, has the property been taken within the meaning of the Fifth and Fourteenth Amendments to the Constitution?

2. When property is taken by the regulatory action of a local government agency, is just compensation the proper remedy?

3. Does California's rule, that just compensation is never an available remedy for a regulatory taking of property, violate the requirements of the Fifth and Fourteenth Amendments to the Constitution as interpreted by this Court?*

PARTIES

All parties to this appeal are listed in the caption. In the proceedings below, separate causes of action were joined against the Los Angeles County Flood Control District. That agency has been held to be an entity separate from the County of Los Angeles and is not involved in the appeal to this Court. The judgment between the plaintiff and the County of Los Angeles is final in the California courts.

* The fourth question presented in the Jurisdictional Statement has apparently been answered affirmatively.

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OPINION BELOW

The opinion of the Court of Appeal, filed June 25, 1986 (JS App. A),¹ was not published. The California Supreme Court denied review, with three of the seven Justices expressing the belief that review should be granted. (JS App. C)

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 USC §1257(2), because a local ordinance was challenged as violating the U.S. Constitution, and the ordinance was upheld.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

"... nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

"SECTION 1. ... nor shall any State deprive any person of life, liberty, or property, without due process of law ..."

Los Angeles County Code §§22.44.220 and 22.44.230, and Los Angeles County Ordinance No. 11855 are reproduced in JS App. F.

STATEMENT OF THE CASE

This case involves what used to be a camp called Lutherglen, maintained for more than two decades by the

¹ In this brief, the Jurisdictional Statement will be cited "JS" and the Joint Appendix "JA."

First English Evangelical Lutheran Church of Glendale (First Church) on 21 acres of land it owns in the mountains of the Angeles National Forest north of the City of Los Angeles. The camp was developed by First Church as a place for retreats and for recreation by church members and handicapped children of all denominations. (JA 6; RT 315, 333)²

In the winter of 1977-1978, a forest fire denuded the hills around Lutherglen. Subsequent extraordinary storms falling on the fire-denuded watershed (which vastly increased the volume of water which hit Lutherglen) caused a flood which destroyed the camp. (JA 8, 10)(RT 320-21, 623-27)

After the storms, the County adopted Ordinance No. 11855, temporarily prohibiting any construction in the area. (JS App. F, pp A31-A32) Three years later, after study, the prohibition was made permanent. (Los Angeles County Code §§22.44.220, 22.44.230; Ordinance No. 12413 [JS App. F, pp A32-A33])

The Complaint alleged that the ordinance prohibits *all* use of Lutherglen, even re-creation of the buildings lost in the flood (JA 12; JS App. F, p A32), and sought just compensation.³

The effect of the ordinance is to make Lutherglen part of the channel which collects mountain runoff and transports the water to a downstream reservoir for storage.

The trial court struck all allegations about the ordinance from the Complaint, holding that it was compelled to

² Some of the background facts were adduced at the trial of unrelated state law issues. As part of the record on appeal, the Reporter's Transcript of that trial (RT) is referred to for these facts.

³ The Complaint alleged the facts, rather than legal theories, as required by long-standing California practice. (See, e.g., *Green v. Palmer* [1860] 15 Cal 411, 414) Having alleged the facts, the plaintiff is permitted to seek any relief those facts will support. (See *Gressly v. Williams* [1961] 193 Cal App 2d 636, 639.)

follow the California Supreme Court's decision in *Agins v. City of Tiburon* (1979) 24 Cal 3d 266, *aff'd on other grounds* (1980) 447 US 255,⁴ which forbade any action for just compensation for a taking effected by a land use regulation. (JS App. D) Judgment was entered after the trial of other issues. (JS App. E)⁵

On appeal, First Church asked the Court of Appeal to reverse on the ground that decisions of this Court and the Ninth Circuit Court of Appeals showed that the California Supreme Court's decision in *Agins I* was improper as a matter of Federal Constitutional law.

The Court of Appeal, however, affirmed. It held that, until this Court *expressly overrules* the California Supreme Court's conclusion in *Agins I*, lower California courts are compelled to follow *Agins I*:

"We conclude that *because the United States Supreme Court has not yet ruled on the question of whether a state may constitutionally limit the remedy for a taking to nonmonetary relief, this court is obligated to follow Agins [I].*" (JS App. A, p A16; emphasis added.)⁶

The California Supreme Court denied review, declining First Church's plea that it re-examine the Constitutionality of *Agins I* in light of later decisions of this Court and the

⁴ The decision of the California Supreme Court will be cited as *Agins I*, while this Court's decision will be cited as *Agins II*.

⁵ Other causes of action were resolved in the County's favor at trial and that judgment was sustained on appeal. The other causes of action present no Federal questions and are not involved in the appeal to this Court.

⁶ As the Court of Appeal's decision was based solely on the Constitutional effect of this Court's decisions and the propriety under the U.S. Constitution of California's remedy for regulatory takings, the proper presentation of the federal Constitutional question is presumed. (*Charleston Fed. S & L Assn. v. Alderson* [1945] 324 US 182, 185-86; *Orr v. Orr* [1979] 440 US 268, 274-75; *Oregon v. Kennedy* [1982] 456 US 667, 671)

Federal Courts of Appeals. Three Justices expressed the belief that review should have been granted. (JS App. C)

Notice of Appeal to this Court was timely filed January 9, 1986 in the California Court of Appeal, Second Appellate District, Division Seven. (JS App. G) Probable jurisdiction was noted by this Court June 30, 1986.

SUMMARY OF ARGUMENT

A. Need For Action By This Court

This Court appears to understand the need the Nation has for an answer to the issue presented by the case at bench. This case is the fifth time in the 1980's that this Court has attempted plenary review to answer the question of whether the U.S. Constitution's "just compensation clause" requires just compensation when a government agency regulates private property to the point where a taking has been effected.⁷

The need for an answer is acute. It is especially so in California, where four of the five cases selected for review by this Court originated. Government agencies in California have been emboldened by the California judiciary to enact a wide variety of regulations which deny the use of private property without compensation. They know that the only consequence they face in California's courts is the theoretical possibility that the regulation will be invalidated.

The upshot is that the rights of individuals who own property are subject to the whim of local government.

The reason for this situation was aptly highlighted by the California Court of Appeal in this case when it concluded

⁷ See *Agins II*; *San Diego Gas & Elec. Co. v. City of San Diego* (1981) 450 US 621; *Williamson County Reg. Plan. Comm. v. Hamilton Bank* (1985) 473 US ___, 87 L Ed 2d 126; *MacDonald, Sommer & Frates v. County of Yolo* (1986) 477 US ___, 91 L Ed 2d 285.

that it must follow *Agins I* until this Court directs otherwise. (JS App. A, p A16)

It is time for this Court to provide a definitive answer to end California's years of unconstitutional abuse of property owners.

B. The Only Issue In The Case At Bench Is The Proper Remedy For A Regulatory Taking

Unlike the earlier cases reviewed by this Court, this case contains no issue of whether a taking occurred or whether the local decision is sufficiently final:

- The Amended Complaint alleges that the County's ordinance, which prohibits all construction,⁸ "... denies First Church all use of Lutherglenn." (JA 12)
- The trial court treated the ordinance as one which "... deprives a person of the total use of his lands ..." (JS App. D, p A26) and dealt only with the question of what remedy the Constitution requires.
- The Court of Appeal likewise accepted the Amended Complaint's allegation of a "... taking of all use of Lutherglenn ..." (JS App. A, p A13) and dealt only with the Constitutionality of the non-compensatory remedy required by the California Supreme Court in *Agins I*. (JS App. A, pp A14-A16)

Last term in *MacDonald*, this Court noted that it must accept the California Court of Appeal's analysis of local law with respect to whether a taking has been alleged and whether local action is final. (See 91 L Ed 2d at 296, n 8.)

⁸ The three year, temporary, ordinance (Ord. No. 11,855) is at JS App. F, pp A31-A32. The permanent ordinance (County Code §§22.44.220 and 22.44.230) is at JS App. F, pp A32-A33.

It was because "... the holdings of both courts below leave open the possibility that some development will be permitted ..." (91 L ed 2d at 296), that this Court found itself unable to reach the remedy issue in *MacDonald*.

No such "possibility" exists here. The courts below assumed that no use was, or would be, permitted First Church and dealt *only* with the remedy issue. That issue is, thus, squarely presented to this Court by the pleadings in this case.

C. The Proper Remedy For A Regulatory Taking Is Just Compensation

Property may be taken for public use in many ways. As the effect on the victim is the same (*see San Diego Gas*, 450 US at 652 [Brennan, J., dissenting]; *MacDonald*, 91 L Ed 2d at 302 [White, J., dissenting]), there is no principled reason for providing different remedies for each different method used to accomplish the taking.

This Court's decisions have *always* said that just compensation, rather than invalidation, is the proper remedy for a taking.⁹ That conclusion is sound both in light of the express words of the just compensation clause and as a matter of public policy.¹⁰ To permit only invalidation as a remedy serves neither property owners (who suffer uncompensated losses, often devastatingly severe) nor public entities (which should have the option

⁹ *Hurley v. Kincaid* (1932) 285 US 95, 104; *U.S. v. Gerlach Live Stock Co.* (1950) 339 US 725, 752; *Fresno v. California* (1963) 372 US 627, 629; *Dugan v. Rank* (1963) 372 US 609, 625-26; *Regional Rail Reorganization Act Cases* (1974) 419 US 102, 134; *Dames & Moore v. Regan* (1981) 453 US 654, 689; *Ruckelshaus v. Monsanto Co.* (1984) 467 US 986, 81 L Ed 2d 815, 841; *U.S. v. Riverside Bayview Homes* (1985) 474 US ___, 88 L Ed 2d 419, 429.

¹⁰ *Larson v. Domestic & Foreign Commerce Corp.* (1949) 337 US 682.

of maintaining the regulation and paying for the consequences).

D. Legitimate Governmental Goals Cannot be Achieved Through Means Which Violate the Constitutional Rights of Individual Citizens

It is too simplistic to argue (as the local government agencies have in each of the precursors to this case) that, once a legitimate "police power" goal has been identified, government may adopt any means it desires to achieve that goal. The means must meet Constitutional standards.

Thus, this Court has repeatedly held (in land use and other cases implicating the Fifth Amendment's just compensation guarantee) that a determination that a goal is legitimate is the *first* question to address, not the last. If there is no legitimate goal, then the action is void *ab initio*.¹¹ If a legitimate goal exists, compensation may still be required.

On at least six recent occasions involving issues as diverse as the installation of television cables, access to a privately dredged marina, retroactive application of bankruptcy legislation, the registration of pesticides, the aftermath of the Iranian hostage crisis, and the bankruptcies of railroads in the northeast United States, this Court has repeatedly underscored the potential need for compensation when private rights are invaded by government agencies seeking to solve legitimate social problems.¹² These holdings are a recognition that the

¹¹ It may also be a taking. (*See Agins II*, 447 US at 260.)

¹² *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 US 419, 425; *Kaiser Aetna v. U.S.* (1979) 444 US 164, 174; *U. S. v. Security Industrial Bank* (1982) 459 US 70, 74-75; *Ruckelshaus v. Monsanto Co.* (1984) 467 US 986, 81 L Ed 2d 815, 841; *Dames & Moore v. Regan* (1981) 453 US 654, 689; *Regional Rail Reorganization Act Cases* (1974) 419 US 102, 134.

"police" power does not exist separately from the "taking" power (and its just compensation component). Instead, they represent overlapping segments on a continuous spectrum of governmental power. In some cases, exercise of the "police" power is valid *only* when accompanied by just compensation.¹³

ARGUMENT

1. DECISIVE ACTION BY THIS COURT IS NEEDED TO COMPEL CALIFORNIA TO ENFORCE THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT

This Court has acknowledged "... the importance of the question whether a monetary remedy in inverse condemnation is constitutionally required in appropriate cases involving regulatory takings ..." (*MacDonald*, 91 L Ed 2d at 294)

The issue is of fundamental importance to Californians because of the expressed intransigence of the California courts to acknowledge the Constitutional requirement of compensation for regulatory takings.

Six U.S. Courts of Appeals (the 5th, 6th, 7th, 8th, 9th, and 11th), the U.S. Claims Court, and six state supreme courts (Minnesota, New Hampshire, North Dakota, Rhode Island, Wisconsin, and Arizona) have adopted the reasoning and analysis of Justice Brennan's *San Diego Gas* dissent (*see also* Justice White's dissent in *MacDonald*) and concluded that compensation is Constitutionally

¹³ See, e.g., *Berman v. Parker* (1954) 348 US 26, 32-33; *Hawaii Housing Auth. v. Midkiff* (1984) 467 US 229, 81 L Ed 2d 186, 196; *Loretto*, 458 US at 425; *Agins II*, 447 US at 260.

compelled.¹⁴ Ohio, Georgia, Massachusetts, Montana, Oregon, Texas, Kansas, Washington, Colorado, Illinois, and Iowa have reached the same conclusion on their own.¹⁵

California is thus becoming increasingly isolated (*no* court has adopted *Agins I*) by hewing to its conclusion that compensation is not constitutionally authorized for a

¹⁴ *Bank of America v. Summerland County Water Dist.* (9th Cir 1985) 767 F 2d 544, 547; *Nemmers v. City of Dubuque* (8th Cir 1985) 764 F 2d 502, 505, n 2; *United States v. Riverside Bayview Homes, Inc.* (6th Cir 1984) 729 F 2d 391, 398, *rev'd on other grounds* (1985) 474 US ___, 88 L Ed 2d 419; *Hamilton Bank v. Williamson County Reg. Plan. Comm'n* (6th Cir 1984) 729 F 2d 402, 408, *rev'd on other grounds sub nom. Williamson County Reg. Plan. Comm'n v. Hamilton Bank* (1985) 87 L Ed 2d 126; *Martino v. Santa Clara Valley Water Dist.* (9th Cir 1983) 703 F 2d 1141, 1148, *cert. denied*, 104 S Ct 151; *Barbian v. Panagis* (7th Cir 1982) 694 F 2d 476, 482, n 5; *In re Aircrash in Bali* (9th Cir 1982) 684 F 2d 1301, 1311, n 7; *Fountain v. Metro Atlanta Rapid Transit Auth.* (11th Cir 1982) 678 F 2d 1038, 1043; *Hernandez v. Lafayette* (5th Cir 1981) 643 F 2d 1188, 1199-1200, *cert. denied* (1982) 455 U.S. 907; *Jentgen v. U.S.* (Ct Cl 1981) 657 F 2d 1210, 1212; *Pratt v. State* (Minn 1981) 309 NW 2d 767, 774; *Burrows v. Keene* (NH 1981) 432 A 2d 15, 20; *Ripley v. City of Lincoln* (ND 1983) 330 NW 2d 505, 510; *Annicelli v. South Kingstown* (RI 1983) 463 A 2d 133, 140; *Zinn v. State* (Wis 1983) 334 NW 2d 67; *Corrigan v. City of Scottsdale* [Ariz 1986] 720 P 2d 513. See also *Pioneer Sand & Gravel v. Anchorage* (Alas 1981) 627 P 2d 651; *Sheerr v. Township of Evesham* (NJ Super 1982) 445 A 2d 46.

¹⁵ *Village of Willoughby Hills v. Corrigan* (Ohio 1972) 278 NE 2d 658, *cert. den. sub nom. Chongris v. Corrigan* (1972) 409 US 919; *Clifton v. Berry* (Ga 1979) 259 SE 2d 35; *Hamilton v. Conservation Comm'n* (Mass App 1981) 425 NE 2d 358; *Knight v. City of Billings* (Mont 1982) 642 P 2d 141; *Suess Builders Co. v. City of Beaverton* (Ore 1982) 656 P 2d 306; *see City of Austin v. Teague* (Tex 1978) 570 SW 2d 389; *Ventures in Property I v. City of Wichita* (Kan 1979) 594 P 2d 671; *Brazil v. City of Auburn* (Wash App 1979) 598 P 2d 1; *Hermanson v. Board of County Comm'rs.* (Colo App 1979) 595 P 2d 694; *Harris Trust & Sav. Bank v. Duggan* (Ill 1983) 449 NE 2d 69; *Osborn v. City of Cedar Rapids* (Iowa 1982) 324 NW 2d 471.

regulatory taking.¹⁶

This has led to some bizarre tensions between state and federal courts, as the Ninth Circuit Court of Appeals (which has federal jurisdiction over California) disagrees. (*Compare Agins I*, 24 Cal 3d 266 with *Bank of America v. Summerland County Water Dist.* [9th Cir 1985] 767 F 2d 544, 547; *Martino v. Santa Clara Valley Water Dist.* [9th Cir 1983] 703 F 2d 1141; and *In re Aircrash in Bali* [9th Cir 1982] 684 F 2d 1301, 1311, n 7.)

California needs to be returned to the Constitutional fold. Those within reach of its judicial power are entitled to the same Constitutional protection afforded other United States citizens.

By failing to decide the issue definitively, this Court has fortified the resolve of those who would deny the Constitutional remedy of just compensation. Indeed, it is not amiss to say that the average person in the street (not to mention the average government official) often mistakes a ruling on procedural grounds¹⁷ for approval of the underlying activity, or views it as *de facto* the same in terms of results. As one commentator expressed it while discussing decisions in the related field of exclusionary zoning:

"When courts are reluctant to reach the merits of alleged exclusion, exclusion is thereby encouraged.

¹⁶ California is so firmly rooted in its view that compensation is never appropriate (*Agins I*; *Furey v. City of Sacramento* [1979] 24 Cal 3d 862; *Baker v. Burbank-Glendale-Pasadena Airport Auth.* [1985] 39 Cal 3d 862, 867, n 4; see *Aptos Seascope Corp. v. County of Santa Cruz* [1982] 138 Cal App 3d 484; *Gilliland v. County of Los Angeles* (1981) 126 Cal App 3d 610), that the issue was discussed only briefly in the Court of Appeal's opinion at bench and the opinion was not deemed important enough to certify for publication. (Under Rule 977, Cal. Rules of Ct., an opinion which simply reiterates settled law is not to be published.)

¹⁷ As occurred in *Agins*, *San Diego Gas*, *Hamilton Bank*, and *MacDonald*.

If an act is challenged unsuccessfully due to the absence of standing, the general public, and often municipal officials, interpret the outcome as an approval of the act itself. The subtleties of judicial restraint, of merits not having been reached, of questions remaining open, are not grasped. More importantly, if the questioned action really is impermissible, the adverse consequences of exclusion are perpetuated still longer." (Delogu, *The Misuse of Land Use Control Powers Must End: Suggestions for Legislative and Judicial Responses* [1980] 32 Me L Rev 29, 70)

The Nation requires certainty and it needs it now. Uniformity of protection of federal Constitutional rights of citizens of all states, as well as respect for the judicial system's ability to provide equal protection, are parts of that need. Further delay in deciding the issue would only add to the number of individuals injured by denial of Constitutional protection.

Moreover, as this Court has decided that these issues need to be first presented to the state courts (see *Hamilton Bank*, 87 L Ed 2d at 144), it is imperative that those 50 courts have a clear, uniform standard to apply in the protection of Fifth Amendment rights. If this Court wants federal Constitutional rights to be protected by state courts, it seems appropriate for this Court to be explicit as to what those rights are and how they are to be protected.

2. PROPERTY CAN BE TAKEN BY A GOVERNMENT REGULATION

One preliminary issue to be disposed of is whether a regulation can effect a taking within the meaning of the just compensation clause, *i.e.*, whether the Constitutional

term "taking" is restricted to physical seizure or has a broader, more common sense, meaning.

While spokesmen for the narrow ground can undoubtedly be found, they would have to re-write a substantial number of this Court's opinions to sustain their view. (See, e.g., *Penn Central Transp. Co. v. City of New York* [1978] 438 US 104, 122, n 25.)¹⁸ Thus, the issue can be disposed of quickly, as all current members of the Court concurred in the following formulation, demonstrating the Court's view that the frequency with which it has said that land use regulations could rise to the level of a taking¹⁹ was neither accidental nor metaphorical:

"We have frequently recognized that a radical curtailment of a landowner's freedom to make use

¹⁸ This Court has long understood that property is not merely a physical thing (*U.S. v. General Motors Corp.* [1945] 323 US 373, 377-78; *Dickman v. Commissioner* [1984] 465 US 330, 336). Indeed, the idea that property is merely a physical thing which can only be "taken" by physical seizure has been dead for so long that one noted scholar has referred to it as "anachronistic" and "outmoded" (Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria* [1970] 44 S Cal L Rev 1, 2, n 5), another calls it "primordial" (Stoebuck, *Condemnation by Nuisance: The Airport cases in Retrospect and Prospect* [1967] 71 Dick L Rev 207, 210), a third terms it "primitive" (Beuscher, *Notes on the Integration of Police Power and Eminent Domain by the Courts: Inverse Condemnation*, in Beuscher & Wright, *Land Use* [1969] 72, 78) and the premier text on eminent domain concludes:

"The modern, prevailing view is that any substantial interference with private property which destroys or lessens its value (or by which the owner's right to its use or enjoyment is in any substantial degree abridged or destroyed) is, in fact and in law, a taking in the constitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remains undisturbed." (2 Nichols, *The Law of Eminent Domain* [3d rev. ed 1975] §6.09 at 6-55; footnote omitted)

¹⁹ E.g., cases collected in *San Diego Gas*, 450 US at 647-50 [Brennan, J., dissenting].

of or ability to derive income from his land may give rise to a taking within the meaning of the Fifth Amendment, even if the Government has not physically intruded upon the premises or acquired a legal interest in the property. Thus, we have acknowledged that a taking would be effected by a zoning ordinance that deprived 'an owner [of] economically viable use of his land.' [Citation.] And we have suggested that, under some circumstances, a land-use regulation that severely interfered with an owner's 'distinct investment-backed expectations' might precipitate a taking. [Citation.]" (*Kirby Forest Indus. Inc. v. U.S.* [1984] 467 US 1, 81 L Ed 2d 1, 13)

Thus, in majority opinions²⁰ as well as multi-Justice dissenting opinions,²¹ this Court has consistently expressed the view that government regulations effect a taking when they deny a property owner the use of all, or most, of his property by denying him the ability to make economically viable use of the property.²²

²⁰ E.g., *Agins II*, 447 US at 260; *Penn Central Transp. Co. v. City of New York* (1978) 438 US 104, 124; *Kaiser Aetna v. U.S.* (1979) 444 US 164, 174, n 8.

²¹ *San Diego Gas*, 450 US at 653 [Brennan, J., dissenting, joined by Stewart, Marshall, and Powell, JJ.]; *MacDonald*, 477 US at ___, 91 L Ed 2d at 302 [White, J. dissenting, joined by Burger, C.J., and Rehnquist and Powell JJ.]; see *Penn Central*, 438 US at 143-44 [Rehnquist, J., dissenting, joined by Burger, C.J., and Stevens, J.].

²² Scholars whose philosophical inclinations are as varied as Professor Richard Epstein and Professor Laurence Tribe agree that the term "taking" requires a broad reading and that whether there has been a taking depends on the impact of the governmental action on the rights of the individual, regardless of the nature of the questioned governmental action.

Professor Epstein:

"What stamps a government action as a taking simpliciter is what it does to the property rights of each individual who is

(continued)

3. THE ONLY ISSUE IN THIS CASE IS WHETHER THE U.S. CONSTITUTION PERMITS A STATE TO PROHIBIT THE RECOVERY OF JUST COMPENSATION AS A REMEDY FOR A REGULATION WHICH DENIES ECONOMICALLY VIABLE USE OF PROPERTY

In the four cases which preceded this one, this Court felt that it was unable to reach the remedy issue because the pleadings left preliminary questions unanswered or because the judgment was not deemed final:

- In *Agins II*, the uses permitted "on paper" were facially reasonable and it was not known what would eventually be permitted.²³

(ftn. continued)

subject to its actions: nothing more or less is relevant . . ." (Epstein, *Takings: Private Property and the Power of Eminent Domain* [1986] 94)

Professor Tribe:

"... forcing someone to stop doing things with his property — telling him you can keep it, but you can't use it — is indistinguishable, in ordinary terms, from grabbing it and handing it over to someone else. Thus, a taking occurs in this ordinary sense when government controls a person's use of property so tightly that, although some uses remain to the owner, the property's value has been virtually destroyed." (Tribe, *American Constitutional Law* [1978] 460; footnotes omitted.)

²³ To learn the events following *Agins II*, see the Amicus Curiae Brief filed by Mr. and Mrs. Agins in the case at bench. After receiving approval to build three homes on their five acres, and spending more than half a million dollars to draw plans for the houses, obtain the permits, and install improvements to comply with city conditions, the city enacted a moratorium (of indefinite duration) on further construction. More than six years after this Court's decision in their case, Mr. and Mrs. Agins remain without use of their property or compensation. (Agins Amicus Curiae Brief at 5-6)

- In *San Diego Gas*, the judgment between the parties was not deemed final.
- In *Hamilton Bank*, it was not clear what variances might be granted under local law to make the subdivision viable. Moreover, an existing state inverse condemnation remedy had not been utilized.
- In *MacDonald*, it was not clear whether less intense development might be permitted.

In each case, the government entity denied that the effect of its regulation was to take the property.

Here, however, the situation differs.

The County has not challenged the sufficiency of the allegations that the ordinance precludes all use of Lutherglen. (See JA 21-22.)²⁴ Rather, the County's entire argument below was that the taking allegations were irrelevant, because compensation is not a permitted remedy.²⁵ In its entirety, the County's argument in support of its Motion to Strike was:

"Beginning at Page 8, line 17, through Page 9 of the Complaint herein, there are allegations regarding the County Ordinance prohibiting reconstruction in the Mill Creek Flood Protection

²⁴ Note that no variance procedure is available to change the effect of the plain words of the ordinance. In California, a variance cannot lawfully be granted for a change of use. (Cal Govt Code §65906; cf. *Furey v. City of Sacramento* [1979] 24 Cal 3d 862, 871)

²⁵ While, in its Motion to Dismiss or Affirm in this Court, the County urged that some use was possible, that argument is based on a misreading of the ordinance. (See First Church's Reply to the motion.) Moreover, as that argument was never raised in the California courts, it seems improper to raise it for the first time here. (See *Heckler v. Campbell* [1983] 461 US 458, 468, n 12; *McGoldrick v. Compagnie Generale Transatlantique* [1940] 309 US 430, 434.)

Area, which have no bearing to any cause of action herein. *It is alleged that a particular ordinance adopted by the County, prohibits the use of plaintiff's property in any manner. These allegations are entirely immaterial and irrelevant and have no bearing upon any conceivable cause of action herein.*

"In the landmark decision in *Agins v. City of Tiburon* (1979) 24 Cal 3d 266, 269-70, the California Supreme Court explicitly held that a zoning ordinance which substantially limits the use of the plaintiff's property, may not provide a basis for the recovery of damages on the property, on the theory of inverse condemnation. The *Agins* decision stands squarely for the proposition that such an Ordinance must be attacked through the remedy of declaratory relief or mandamus. *No cause of action for damages can arise therefrom.* Therefore, the allegations regarding this ordinance are entirely immaterial to the action herein, and should be properly stricken from the Complaint." (JA 21-22; emphasis added.)²⁶

Because the County did not challenge the factual sufficiency of the taking allegations, both the trial court (JS App. D, p A26) and the Court of Appeal (JS App. A, pp A13-A14) properly accepted the sufficiency of the allegations.

In *MacDonald*, this Court held itself bound by the California Court of Appeal's conclusion that no taking had been properly pled. (*MacDonald*, 91 L Ed 2d at 296) By the same reasoning, the Court here should accept the Court

²⁶ As a matter of possible historical interest, the original Complaint at bench was filed February 21, 1979 (JA 1), three weeks before the California Supreme Court decided *Agins I*. At that time, the law in California was that stringent land use regulation could result in a taking requiring just compensation. (See *Eldridge v. City of Palo Alto* [1976] 57 Cal App 3d 613, disapproved in *Agins I*.)

of Appeal's assumption that a taking *has* been properly pled.

The *only* question the Court of Appeal dealt with was whether the U.S. Constitution permits California's rule that just compensation is not an available remedy for a regulatory taking. (JS App. A, pp A13-A16) *Only one reason* was given in support of its affirmance of the trial court's order striking this cause of action: the failure of this Court to rule on the question of whether California's non-compensation rule is Constitutionally infirm. (JS App. A, p A16)

Thus, while this Court has been concerned with ascertaining the confluence of events which render a local determination sufficiently final, as well as sufficiently intrusive on the rights of individual property owners to properly allege a taking (*Agins II*, 447 US at 260; *Hamilton Bank*, 87 L Ed 2d at 139-43; *MacDonald*, 91 L Ed 2d at 295-97), no such issues are presented here. Neither the County nor the California courts questioned the pleading that the ordinance prevents all economically viable use in the litigation below. On this record, this Court may properly conclude that a final action resulting in a taking has been adequately pled. That is what the California courts did. The only issue litigated was the propriety under the U.S. Constitution of California's rule which prohibits an award of damages for a regulatory taking.

This Court may confidently proceed to the remedy issue in this case: it is the *only* issue presented.

4. JUST COMPENSATION IS THE REMEDY MANDATED BY THE FIFTH AMENDMENT FOR A REGULATORY TAKING OF PROPERTY

California is committed to the theory that compensation can *never* be a remedy for a regulatory taking. (*Agins I; Furey v. City of Sacramento* [1979] 24 Cal 3d 862; *Baker v. Burbank-Glendale-Pasadena Airport Auth.* [1985] 39 Cal 3d 862, 867, n 4; see *Aptos Seascope Corp. v. County of Santa Cruz* [1982] 138 Cal App 3d 484; *Gilliland v. County of Los Angeles* [1981] 126 Cal App 3d 610; the case at bench [JS App A, p A16].)

However, because the effect of a taking on the property owner is the same regardless of the *method* used by local government to accomplish the taking (*San Diego Gas*, 450 US at 652 [Brennan, J., dissenting]; *MacDonald*, 91 L Ed 2d at 302 [White, J. dissenting]) and, as the following discussion shows, this Court has consistently held that the proper remedy for a taking is just compensation, California's rule does not satisfy the Fifth Amendment.

Thus, while the precise mechanics of compensation need not be spelled out,²⁷ it is necessary that California be told

²⁷ The potential complexities and difficulties of valuation are acknowledged. (See *MacDonald*, 91 L Ed 2d at 304 [Rehnquist, J., dissenting].)

Courts, however, have had broad experience in formulating rules to convert the simple phrase "just compensation" into dollars and cents (see, e.g., *Kanner, Condemnation Blight: Just How Just is Just Compensation?* [1973] 48 Notre Dame Law. 765, 770-87), and one noted commentator has suggested that the "difficulties of valuation and appraisal are not more difficult in these instances than in cases of condemnation where the taking involves something less than the fee." (*Babcock, The Zoning Game* [1966] 171) Discussions of valuation techniques may be found in *Windfalls for Wipeouts: Land Value Capture & Compensation* (Hagman & Mischynski eds. 1978); Blume

(continued)

directly and expressly that it may *not* "limit the remedy for a taking to nonmonetary relief . . ." (JS App. A, p A16.)

A. This Court Has Consistently Held That Compensation — Not Invalidation — Is The Proper Remedy For A Taking

The Fifth Amendment is unambiguous in its command: "... nor shall private property be taken for public use without just compensation."

To preclude government agencies from confiscating private property to advance the public interest,²⁸ the just compensation clause has been treated as "self-executing." (*U.S. v. Clarke* [1980] 445 US 253, 257)

When a taking occurs, compensation is mandated. (E.g., *Jacobs v. U.S.* [1933] 290 US 13, 16; *Kirby Forest Indus., Inc. v. U.S.* [1984] 467 US 1, 81 L Ed 2d 1, 13.)

(ftn. continued)

& Rubinfield, *Compensation for Takings: An Economic Analysis* (1984) 72 Calif L Rev 569; Hagman, *Temporary or Interim Damages Awards in Land Use Control Cases*, in *Zoning and Planning Law Handbook* (1982) 201.

Suffice it to note that our courts have had 200 years' experience in valuing property (including a host of cases — particularly during World War II — which involved temporary and partial takings). If valuation problems are manageable when the government expressly wants to take private property in part or for a limited period of time, no reason appears why the same problems are any less manageable when the same kind of taking results from a regulation.

When, in June 1986, the Arizona Supreme Court aligned itself with the views of Justice Brennan in *San Diego Gas* (*Corrigan v. City of Scottsdale* [Ariz 1986] 720 P 2d 513; slip op, pp 7-12), it concluded that it need not restrict trial courts to any single valuation technique, as each case could be evaluated on its own facts. (*Corrigan*, 720 P 2d at ___; slip op, pp 13-14)

²⁸ The "... political ethics reflected in the fifth amendment reject confiscation as a measure of justice." (*U.S. v. Cors* [1949] 337 US 325, 332)

In applying these precepts, this court has consistently held (for at least the last half-century) that compensation — not invalidation — is the proper remedy. (*Hurley v. Kincaid* [1932] 285 US 95, 104; *U.S. v. Gerlach Live Stock Co.* [1950] 339 US 725, 752; *Fresno v. California* [1963] 372 US 627, 629; *Dugan v. Rank* [1963] 372 US 609, 625-26; *Regional Rail Reorganization Act Cases* [1974] 419 US 102, 134; *Dames & Moore v. Regan* [1981] 453 US 654, 689; *Ruckelshaus v. Monsanto Co.* [1984] 467 US 986, 81 L Ed 2d 815, 841; *U.S. v. Riverside Bayview Homes* [1985] 474 US ___, 88 L Ed 2d 419, 429)

These cases are built on the hornbook proposition that when examining a legislative enactment for Constitutionality, that construction should be applied which renders the enactment Constitutional, rather than void. (*See, e.g., Fletcher v. Peck* [1810] 6 Cranch [10 US] 87, 128; *Regional Rail Reorganization Act Cases* [1974] 419 US 102, 134.) The way this Court has dealt with legislation which would be unconstitutional if it did not provide compensation has been to construe the legislation as requiring compensation. Such a construction upholds, rather than invalidates, the legislation.

Hurley v. Kincaid (1932) 285 US 95, a unanimous decision authored by Justice Brandeis, is an exemplar. There, this Court reversed an injunction against a threatened uncompensated taking of land. The Court's rationale combined the Constitutional preference for upholding legislation with traditional precepts of equity jurisprudence.²⁹ The only infirmity in the government's plan was its failure to compensate. Compensation, however, could be supplied through inverse condemnation.

²⁹ This Court has repeatedly linked concepts of equity and fairness to its interpretation of the just compensation guarantee. (*E.g., Penn Central Transp. Co. v. City of New York* [1978] 438 US 104, 124; *U.S. v. Fuller* [1973] 409 US 488, 490; *U.S. v. Virginia Elec. & Power Co.* [1961] 365 US 624, 631; *Armstrong v. U.S.* [1960] 364 US 40, 49.)

Because there was an adequate legal remedy through inverse condemnation, and the legislation could be upheld if a provision for compensation were inferred, injunctive relief (invalidation) was not available.³⁰

In 1984, this Court reconsidered and reconfirmed this line of cases in an opinion by Justice Blackmun, expressing the views of all but Justice White (who did not participate):

"Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." (*Ruckelshaus v. Monsanto Co.* [1984] 467 US 986, 81 L Ed 2d 815, 841)

In 1985, this Court reiterated the *Ruckelshaus* holding, explaining its rationale in a unanimous opinion by Justice White:

"This maxim rests on the principle that so long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional." (*U.S. v. Riverside Bayview Homes* [1985] 474 US ___, 88 L Ed 2d 419, 427; emphasis added.)

Thus, as a matter of settled Fifth Amendment interpretation, the remedy for a taking of property is compensation.

B. Compensation — Rather Than Invalidation — Makes Sense as Public Policy

Beyond the plain words of the Fifth Amendment, and this Court's consistent enforcement of them, compensation is preferable to invalidation as public policy.

³⁰ *Hurley* has been cited with approval as recently as *Hamilton Bank*. (87 L Ed 2d at 144) For a fuller discussion, see *Kanner, Inverse Condemnation Remedies in an Era of Uncertainty* (1980) Institute on Planning, Zoning & Eminent Domain 177, 197-206.

To put it bluntly, the sensitive balance of power in our tri-partite governmental structure could not long endure if the judiciary felt free to disregard considered legislative judgments and delicate legislative compromises about necessary government actions and routinely invalidate measures as a matter of *first* resort. This Court has plainly expressed its refusal to act in such a fashion:

"... it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the *strongest reasons of public policy* for the rule that such relief cannot be had against the sovereign. *The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right.* As was early recognized, the interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief ..." (*Larson v. Domestic & Foreign Commerce Corp.* [1949] 337 US 682, 704; emphasis added.)

To put *Larson* in more contemporary garb, would it have made sense as public policy for a judge to be authorized to undo Congress' delicate resolution of the massive rail bankruptcies (and possibly bring rail transportation in the most populous sector of the Nation to a halt), or to undermine the President's precarious settlement of the Iranian hostage crisis, simply because someone "... present[ed] a disputed question of property or contract right?" Plainly not. (*Regional Rail Reorganization Act Cases* [1974] 419 US 102; *Dames & Moore v. Regan*

[1981] 453 US 654)

In the formative years of this Court's jurisprudential doctrine, Chief Justice Marshall enduringly expressed the elemental precept of deference to legislative choice whenever possible:

"But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." (*M'Culloch v. Maryland* [1819] 4 Wheat. [17 US] 316, 421)

Legislative bodies must deal with a broad spectrum of issues. The deference decreed in *M'Culloch* has been exercised in cases dealing with such disparate subjects as the selection of post office sites (*U.S. v. Carmack* [1946] 329 US 230, 243), the development of rural electrical power (*U.S. ex rel. T.V.A. v. Welch* [1946] 327 US 546, 552), urban redevelopment (*Berman v. Parker* [1954] 348 US 26, 33), potentially catastrophic railroad bankruptcies (*Regional Rail Reorganization Act Cases* [1974] 419 US 102, 134), and providing the President with the requisite "bargaining chip" to resolve the Iranian hostage crisis (*Dames & Moore v. Regan* [1981] 453 US 654, 673).

Such deference is required, as this Court put it in *Hurley v. Kincaid* (1932) 285 US 95, 104, n 3, because "... large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends ..." (See also Comment,

Just Compensation or Just Invalidation: the Availability of a Damages Remedy in Challenging Land Use Regulations [1982] 29 UCLA L Rev 711, 720.)³¹

To use invalidation as the sole remedy for regulatory takings uses a meat axe to solve the problem instead of the balanced approach adopted by this Court. It permits only two choices: all or nothing. It either forces a property owner to suffer without remedy in jurisdictions (like California) where the courts rarely invalidate at all, or it deprives legislative bodies of the ability to decide whether the game is worth the candle, *i.e.*, whether the goal is important enough to achieve even if compensation is required.

By contrast, the compensation remedy *does* defer to legislative discretion. It permits the legislative body to choose the course it deems best. The theory proposed in the *San Diego Gas* dissent by Justices Brennan, Stewart, Marshall and Powell, and adopted in the *MacDonald* dissent by Justice White and Chief Justice Burger, gives the option to local legislatures of whether to keep, modify, or abandon the Constitutionally overreaching regulation. It merely requires compensation when pursuit of that course

³¹ The pressure on courts to uphold legislation in order to avoid such "embarrass[ment]" would be intense if the sole remedy were invalidation. In such cases, the tendency to sacrifice the individual to the greater good of the community would be well nigh irresistible. That, indeed, may explain the rarity in California of any decisions holding regulations unconstitutional. (See, *e.g.*, Babcock & Siemon, *The Zoning Game Revisited* [1985] 251, 257, 293; 1 Williams, *American Land Planning Law* [1974] §6.03 at 115-16.) The lack of a compensatory remedy impels the decisionmaker to that result.

On the other hand, Professor Tribe notes that the compensation remedy is "... an attempt to limit arbitrary sacrifice of the few to the many" (Tribe, *American Constitutional Law* [1978] 463), and the Court of Claims candidly acknowledged that the availability of a compensatory remedy in Federal law "... has saved the day in many [a] sticky situation." (*Drakes Bay Land Co. v. U.S.* [Ct Cl 1970] 424 F 2d 574, 587)

impinges so harshly on private rights that the taking threshold is crossed.

C. Invalidation — By Itself — is an Illusory Remedy

California has established that invalidation is the only remedy for a regulatory taking of property. (*Agins I*)

Invalidation is a remedy which *sounds* plausible when stated, but provides no relief in actuality. The remedy makes it *appear* that something has happened, and the architects of this remedy may even have convinced themselves that they are supplying relief. But no relief is given, and the cure has all the substance of smoke.

1. Invalidation Comes Too Late

Invalidation *could* only provide meaningful relief if a court reviewed a regulatory act *before* the regulation adversely affected the individual rights of property owners. However, in our American litigational format, the rendering of such an "advisory" opinion before the existence of an actual "case or controversy" is generally prohibited.

Thus, when a court reviews a regulation *after* it has already had the effect of taking private property rights and inflicting economic losses, invalidation — standing alone —³² is largely beside the point. The entity has *completed* a violation of the Constitutional protection against uncompensated takings. Serious damages may already have been suffered. That violation is not cured when a court merely *informs* the entity of the fact of its violation

³² *I.e.*, without compensation for the temporary taking which occurred while the regulation was enforced. (See *San Diego Gas*, 450 US at 653-660 [Brennan, J., dissenting]; *MacDonald*, 91 L Ed 2d at 303 [White, J., dissenting].)

by invalidating the regulation years later. Only just compensation can cure the completed or on-going violation and provide recompense for the taking.

Contrary to the California rationalization of *Agins I*, a property owner who obtains compensation does not "... transmute an excessive use of the police power into a lawful taking ..." (24 Cal 3d at 273) He only recovers compensation for a taking which has already occurred. It is the governmental entity which has, through an excessive use of the police power, itself created a situation in which a *de facto* taking of property rights is a *fait accompli*.³³

Invalidation after the fact — unaccompanied by any compensation — fails to provide the Constitutionally required remedy. As Professor Tribe recently noted in a discussion of *San Diego Gas*:

"On the merits, Justice Brennan concluded quite reasonably that, although nothing in the Compensation Clause empowers a court to compel the government to exercise its power of eminent domain where the regulatory 'taking' is temporary and reversible and the government would rather end the 'taking' than purchase the property, the government must compensate the property owner for whatever taking occurred between the enactment and the repeal of the offending regulation."³⁴

³³ Justice Brennan cogently noted in *San Diego Gas* that the "remedy" of invalidation provides no redress for years of non-use and provides no incentive to government agencies to obey the Constitution. (450 US at 656 [Brennan, J., dissenting]). See also *MacDonald*, 91 L Ed 2d at 303 [White, J., dissenting]; Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis* (1977) 86 Yale L J 385, 507-11.

³⁴ Tribe, *Constitutional Choices* (1985) 385-86, n 23 (Emphasis added.)

To the same effect, though pre-dating *San Diego Gas*, are *Windfalls For Wipeouts: Land Value Capture and Compensation* (Hagman & Misczynski eds. 1978) 296-297; and Ellickson, 86 Yale L J at 507-11.

The only way to satisfy the command of the just compensation clause *when a taking is on-going or has already occurred* is by payment of compensation for the period of the taking.

2. Invalidation Permits Government Gamesmanship

Using invalidation as the sole remedy is an invitation to abuse. The major problem is that the only "relief" granted the property owner is the right to have the regulating entity draft a new regulation.³⁵ The courts do not direct the entity to adopt any particular regulation. The upshot of this is that the property owner is at the mercy of the regulator. Richard Babcock, Dean of the American land use bar, noted this problem eloquently two decades ago:

"[I]f the Supreme Court of California were to say to the local legislature in Community X that its policy is improper that injunction, I suspect, would have little practical impact upon the identical administrative actions of Community Y or perhaps even on Community X itself. Other lawyers have shared the experience that follows a victory on behalf of a landowner in the state Supreme Court. You have obtained a decision that the single-family classification of your client's property is unreasonable. Your client wants to use the property for commercial purposes. The community immediately rezones the property to a Duplex Zone and invites you to spend another two years and

³⁵ See, Kmiec, *Regulatory Takings: The Supreme Court Runs Out of Gas in San Diego* (1982) 57 Ind L J 45, 51; Comment, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations* (1982) 29 UCLA L Rev 711, 732-34.

thousands of dollars litigating that classification."³⁶

In the two decades since Mr. Babcock wrote that, the only changes are that the time and use of court resources needed to litigate have lengthened and the cost has escalated. The governmental gamesmanship has not changed. (See Babcock & Siemon, *The Zoning Game Revisited* [1985] 288.) The same governmental ploy is reported by a former Los Angeles City Planner (Branch, *Sins of City Planners* [1982] 42 Pub Ad Rev 1, 4) as well as academic observers (*Windfalls for Wipeouts: Land Value Capture and Compensation* [Hagman & Mischynski eds. 1978] 293).

Thus, the supposedly victorious property owner, who has succeeded in having a court invalidate an unconstitutional regulation, finds himself as empty-handed after the litigation as he was before. (In fact, he is worse off: he is out the money for the litigation, and he has lost years of use of his property.) In response to the judgment, the entity can simply enact another unconstitutional regulation. The game can continue until the property owner exhausts his patience, his sanity, his life savings, his time on earth, or all four.³⁷ Time is on the regulator's side. When the

³⁶ Babcock, *The Zoning Game* (1966) 13 (emphasis in original). See also Delogu, *Local Land Use Controls: An Idea Whose Time Has Passed* (1984) 36 Me L Rev 261, 278; Delogu, *The Misuse of Local Land Use Control Powers Must End: Suggestions for Legislative and Judicial Responses* (1980) 32 Me L Rev 29, 36.

³⁷ A distressing, yet increasingly familiar, pattern has developed wherein property is lost through foreclosure when planning delays disrupt the right to use land to generate income. (See, e.g., *Jacobson v. Tahoe Reg'l Plan. Agency* [9th Cir. 1977] 566 F 2d 1353, 1366-67, *aff'd in part and rev'd in part sub. nom. Lake Country Estates, Inc. v. Tahoe Reg. Plan. Agency* [1979] 440 US 391; *Hollister Park Inv. Co. v. Goleta County Water Dist.* [1978] 82 Cal App 3d 290; *Orsetti v. Fremont* [1978] 80 Cal App 3d 961; *Frisco Land & Mining Co. v. State* [1977] 74 Cal App 3d 736; cf. *County of Los Angeles v. Berk* [1980] 26 Cal 3d 201; *Klopping v. City of Whittier* [1972] 8 Cal 3d 39.)

property owner finally succumbs, the local government — even though it may have lost every judicial round — emerges victorious. Its disincentive to unconstitutional conduct is non-existent. The property owner's relief is just as non-existent. (See Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, [1983] 15 Rutgers L J 15, 69-70)

Plainly, this is a game a property owner cannot win. It is a game he should not have to play. It is so cynical, unfair, and surreal that it puts a legal system which uses it into disrepute.³⁸

It is because of such serious problems and opportunities for abuses which become possible if the compensation remedy is eliminated that one reads with concern Justice Stevens' concurring opinion in *Williamson County Regional Planning Commission v. Hamilton Bank* (1985) 473 US ___, 87 L Ed 2d 126, 148. He there expressed the view that loss of use of one's property and the damages that result are the natural consequence of delays inherent in litigation, for which compensation is not appropriate. His view is premised on a hope — not regularly borne out by experience — that planners and regulators "generally make a good-faith effort to advance the public interest." (87 L Ed 2d at 151) If nothing else, the commentaries cited in this brief render the basis for that theory questionable.³⁹

³⁸ For a graphic illustration, see the Amicus Curiae Brief filed at bench by Mr. and Mrs. Agins (pp 5-6), which describes the actions of the City of Tiburon following this Court's decision in *Agins II*. For scholarly assessments of life under the California system, see JS 10-13.

³⁹ However much one wishes to believe that one's government acts only with honorable motives, the annals of jurisprudence (including this Court's opinions) are replete with instances where such wishes (continued)

Even assuming the soundness of Justice Stevens' hope for municipal good faith, engrafting that hope onto the body of Constitutional doctrine would require wholesale revisions of established legal precepts. First, as this Court recently held in *Owen v. City of Independence* (1980) 445 US 622, 651-52, whether government entities act in good or bad faith is irrelevant. The only question is whether they violated the plaintiff's Constitutional rights.⁴⁰ Second, if good faith of the regulators is the premise, then surely that would require inquiry into the motives of the decision makers, something which the law does not presently permit. (See, e.g., *U.S. v. Morgan* [1941] 313 US 409, 422.) Third, this Court has repeatedly held that regulatory actions may require compensation notwithstanding (indeed, perhaps because of) legitimate governmental intentions. (See pp 39-47 herein.)

Moreover, it is difficult to see why a property owner should be deprived of compensation for economic injury already suffered any more than Chief Owen should have been deprived of his back pay and benefits lost during the

(fn. continued)

were harshly disappointed. Law, as an instrument for the rectification of wrongs, must take that into account and must not shape its remedial rules as if employment by any local government agency were a guarantee of sterling character. It isn't. Moreover, even where intentions are honorable, Justice Brennan put his finger on the pragmatic key when he queried, "... if a policeman must know the constitution, then why not a planner?" (*San Diego Gas*, 450 US at 661, n 26 [Brennan, J., dissenting])

⁴⁰ Inverse condemnation liability has *always* been based on the effect of governmental action on the rights of private property owners, not the *intent* of the government to pay for property rights and acquire them. (See *Meigs v. M'Clung's Lessee* [1815] 9 Cranch [13 US] 11, 18; *U.S. v. Dickinson* [1947] 331 US 745, 747-49; *U.S. v. Dow* [1958] 357 US 17, 21-22; *Ruckelshaus v. Monsanto Co.* [1984] 467 US 986, 81 L Ed 2d 815, 833-34.) As Justice Stewart put it in *Hughes v. Washington* (1967) 389 US 290, 298 (Stewart, J., concurring): "[T]he Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*." (Emphasis in original.)

time he had to litigate to vindicate his rights against the city's claim that it was acting in good faith. (See 445 US at 652, n 35.) If anything, the property owner in this type of case seems *a fortiori* entitled to compensation because, by denying him reasonable use of his land and *de facto* converting it to part of a system of flood control works (or community "open space," or "agricultural preserve," or the like), the Constitutional wrong against the owner simultaneously confers a tangible benefit on the community, which thus "enjoys the benefits of the government's activities." (445 US at 655) In land use cases particularly, the community enjoys a substantial and often economic *quid pro quo* for its payment.

"Thus, even when some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized have been violated." (445 US at 655)

This conclusion seems even more pertinent in light of the Fifth Amendment's *express* guarantee of just compensation. There is no need to "infer" a compensatory remedy as this Court has *done* in other instances.⁴¹

⁴¹ E.g., *Bivens v. Six Unknown Named Agents* [1971] 403 US 388, 396; *Davis v. Passman* [1979] 442 US 228, 248; *Bell v. Hood* [1946] 327 US 678, 684.

Issues relating to *when* a regulation effects a taking need not be dealt with in this case, as the only issue presented here is the proper remedy to apply *after* a taking has already occurred. When the taking occurred is a question of fact for trial, as in any inverse condemnation case. (See *U.S. v. Dickinson* [1947] 331 US 745, 748-49.) For a discussion of the timing problem and suggestions for reciprocal duties of notice on property owners and compelling local governments to specify what uses will be permitted, see Kayden, *When Is a Regulatory Taking Effective: The Timing Issue*, monograph no. ___, Lincoln Inst. of Land Policy (forthcoming, 1986).

In his *San Diego Gas* dissent, Justice Brennan quoted the game playing advice of a California City Attorney (and author of a widely used California land use text) which, in flippancy terms, summarized the plight of California property owners. (450 US at 655-56, n 22)⁴² The discussion in this section shows that those remarks cannot be dismissed as mere convention humor.

D. The Arguments Against Compensation Are Not Substantial

Putting aside, for the moment, the fact that the arguments alluded to in the heading above are contrary to the express words of the Fifth Amendment, as well as a half century of this Court's holdings (see pp 19-21 herein), three primary reasons have been advanced for not awarding compensation for regulatory takings. Compensation, assertedly, would:

- usurp a legislative function;
- bankrupt government treasuries; and
- "kill" the will of government to pursue necessary goals.

Each of these rationalizations is unmeritorious. None presents a principled reason for confiscating valuable rights of randomly chosen, private citizens. Each allows concern for governmental welfare to swallow the Fifth Amendment's prohibition against uncompensated takings. (Compare *Kaiser Aetna v. U.S.* [1979] 444 US 164, 177;

⁴² The Arizona Supreme Court likewise emphasized this passage in *Corrigan v. City of Scottsdale* (1986) 720 P 2d 513; slip op, pp 11-12, n 2, and rightly so.

Pennsylvania Coal Co. v. Mahon [1922] 260 US 393, 415-16.)

1. Ordering Compensation For a Taking Does Not "Usurp" Any Legislative Function

Because land use regulations are said to be enacted pursuant to the police power, some argue that judicial awards of compensation for regulations which effect a taking of property "usurp" the legislative prerogative of deciding on appropriate regulations. (*Agins I*, 24 Cal 3d at 276)

That is wrong. Indeed, it is so wrong, it is backwards.

The Arizona Supreme Court responded succinctly:

"No legislative prerogative is usurped by awarding damages for the time the property was temporarily taken under an invalid zoning ordinance. The regulating body can still weigh all the relevant considerations and determine for itself how best to effectuate its policy in the future. The same alternatives are open to them after a remedy of invalidation plus temporary damages as exist after invalidation alone. The legislative body may pay to acquire the land outright, agree to pay the landowner a certain amount in order to continue the regulation, or simply abandon the regulation altogether." (*Corrigan v. City of Scottsdale* [Ariz. 1986] 720 P 2d 513; slip op, p 10)⁴³

⁴³ See also Comment, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations* (1982) 29 UCLA L Rev 711, 728, n 102. For cases applying a damages remedy after invalidating an ordinance, see *Wheeler v. City of Pleasant Grove* (5th Cir 1981) 664 F 2d 99, 101; *Nemmers v. City of Dubuque* (8th Cir. 1985) 764 F 2d 502; *Gordon v. City of Warren* (6th Cir. 1978) 579 F 2d 386; *6th Camden Corp. v. Township of Evesham* (DNJ 1976) 420 F Supp 709, 727-28; *City of Austin v. Teague* (Tex. 1978) 570 SW 2d 389.

In fact, it is invalidation if anything, which "usurps" legislative power. If the sole remedy is invalidation, the judiciary assumes the right on a continuing basis to overrule legislative determinations. It stifles legislative flexibility.

Moreover, sole reliance on invalidation would disregard the teaching of *Ruckelshaus v. Monsanto Co.* (1984) 467 US 986, 81 L Ed 2d 815 and *Hawaii Housing Auth. v. Midkiff* (1984) 467 US 229, 81 L Ed 2d 186 (to mention two recent examples). In this line of cases, the Court held that the judicial role in "second guessing the legislature" is extremely narrow. Providing compensation comports with this rule. It leaves the regulation intact, thus giving deference to the legislative determination that it is needed, and merely adds a compensatory element when that is deemed to be Constitutionally required.

Thus, far from "usurping" the prerogative of the legislature, the compensation remedy *defers* to the legislature by upholding the regulation when proper compensation is provided. That leaves legislative bodies a full range of choice, something the invalidation remedy cannot do.

2. The Cost of Constitutional Compliance Is No Basis For Constitutional Avoidance

The next argument raised against a compensatory remedy is the Chicken Littlesque cry that compensation will bankrupt government treasuries. (See *Agins I*, 24 Cal 3d at 276.)

The short answer was provided by Justice Brennan's dissent in *San Diego Gas*:

"But the applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments made by legislative, executive, or judicial branches. Nor can the vindication of those rights depend on the expense in doing so. See *Watson v. Memphis*, 373 US 526 (1963)." (450 US at 660-61)⁴⁴

Denying compensation for a conceded taking neither *lowers* nor *eliminates* the cost of the public project. Instead, it *shifts* the cost from the general public (where, in fairness, it belongs) to the backs of randomly selected individuals, in a way this Court has previously condemned. (See, e.g., *Armstrong v. U.S.* [1960] 364 US 40, 49; *Monongahela Nav. Co. v. U.S.* [1893] 148 US 312, 325; *U.S. v. Willow River Power Co.* [1945] 324 US 499, 502.)⁴⁵

⁴⁴ The New Hampshire Supreme Court was equally adamant on this issue: "As we have said before, public officials have a duty to obey the constitution, and they have no right or legitimate reason to attempt to spare the public the cost of improving the public condition by thrusting that expense upon an individual. [Citations.]" (*Burrows v. City of Keene* [NH 1981] 432 A 2d 15, 20) See also *Zinn v. State* (Wis 1983) 334 NW 2d 67, 74.

⁴⁵ In like manner, Professor Michelman has called for "... resolute sophistication in the face of occasional insistence that compensation payments must be limited lest society find itself unable to afford beneficial plans and improvements. What society cannot, indeed, afford is to impoverish itself. It cannot afford to instigate measures whose costs, including costs which remain 'unsocialized,' exceed their benefits. Thus, it would appear that any measure which society cannot afford or, putting it another way, is unwilling to finance under conditions of full compensation, society cannot afford at all." (Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundation of "Just Compensation"* Law [1967] 80 Harv L Rev 1165, 1181; footnotes omitted)

Moreover, this argument is mere economic sleight-of-hand. It is based on a strange calculus by which potential economic losses on the government are said to be "catastrophic," while their imposition on individual citizens is seen as *de minimis*. Please recall that those who make this argument are talking about the fiscal consequences of *the same act*. Commentators have highlighted the fallacy in this argument: If the damage done to individuals is in fact *de minimis*, then the liability of government agencies will be likewise. By the same analysis, if the governmental half of this curious "equation" is correct, and catastrophic judgments could be in the offing, then individual citizens have been suffering horrendous, uncompensated losses and the Constitutional defalcations of regulatory agencies have been outrageous. (*Windfalls for Wipeouts: Land Value Capture & Compensation* [Hagman & Mischynski, eds. 1978] 297; Comment, *Just Compensation or Just Invalidity: The Availability of a Damages Remedy in Challenging Land Use Regulations* [1982] 29 UCLA L Rev 711, 730)

Finally, a recent state court decision searched for the morality of this argument and found none:

"... fears of fiscal liability did not stop courts from limiting or abolishing municipal sovereign immunity and likewise should not bar a person's constitutionally guaranteed compensation for the impermissible taking of his property." (*Corrigan v. City of Scottsdale* [Ariz 1986] 720 P 2d 513; slip op, p 10)

(ftn. continued)

Likewise, Van Alstyne, *Just Compensation of Intangible Detriment: Criteria for Legislative Modification in California* (1969) 16 UCLA L Rev 491, 543-44.

3. The "Chilling Effect" Argument Is Without Basis And Has Been Repeatedly Rejected

The final argument against compensation is that it will "chill" the efforts of government to devise solutions to legitimate problems. (*Agins I*, 24 Cal 3d at 276)

This Court has been a frequent target of such "chilling" arguments. It has not bowed to the pressure.⁴⁶ In the land use context, Justice Brennan may have said it all in his *San Diego Gas* dissent:

"Indeed, land-use planning commentators have suggested that the threat of financial liability for unconstitutional police power regulations would help to produce a more rational basis of decision making that weighs the costs of restrictions against their benefits. Dunham, *From Rural Enclosure to Re-Closure of Urban Land*, 35 NYUL Rev 1238, 1253-1254 (1960). Such liability might also encourage municipalities to err on the constitutional side of police power regulations, and to develop internal rules and operating procedures to minimize overzealous regulatory attempts. Cf. *Owen v. City of Independence*, 445 US 622, 651-652, 63 L Ed 2d 673, 100 S Ct 1398 (1980). After all, if a policeman must know the Constitution, then why not a planner? In any event, one may wonder as an empirical matter whether the threat of just

⁴⁶ See, e.g., the following cases, in which concurring or dissenting Justices expressed concerns that the fiscal consequence of the decision would chill governmental action: *Garcia v. San Antonio Metropolitan Transit Auth.* (1985) 469 US 528; *Owen v. City of Independence* (1980) 445 US 622; *Nevada v. Hall* (1979) 440 US 410; *Butz v. Economou* (1978) 438 US 478; *Monell v. Department of Social Services* (1978) 436 US 658; *City of Lafayette v. Louisiana Power & Light Co.* (1978) 435 US 389; *Milliken v. Bradley* (1977) 433 US 267; *U.S. v. Causby* (1946) 328 US 256. *Causby* was a takings case.

compensation will greatly impede the efforts of planners. *Cf. id.*, at 656, 63 L Ed 2d 673, 100 S Ct 1398." (450 US at 661, n 26)⁴⁷

Other judicial decisions reiterate this belief that the concern for Constitutional limitations will ensure better service from government employees. *Owen v. City of Independence* [1980] 445 US 622, 656; *Burrows v. City of Keene* [NH 1981] 432 A 2d 15, 20; *Corrigan v. City of Scottsdale* [Ariz 1986] 720 P 2d 513; slip op. pp. 10-12); see *Hutto v. Finney* [1978] 437 US 678, 691.)⁴⁸

Thus, not only does the "chilling" argument have no Constitutional standing to override the Fifth Amendment, it lacks validity on its face. It ought not serve as the tool to subvert the Constitutional rights of damaged citizens.

One might even be so bold as to suggest that "chilling" unconstitutional conduct is a good idea. Indeed, it is the hallmark of the Bill of Rights.

⁴⁷ Questioning of the empirical basis for the "chilling" argument was validated in a recent land use commentary. (Comment, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations* [1982] 29 UCLA L Rev 711, 730) It was there shown that the courts and commentators who expressed fears that the sky would fall had no empirical data to support their conclusions. Instead, they incestuously cited each other.

⁴⁸ Ironically, the California Supreme Court both understands this precept and agrees with it when dealing with cases outside the field of land use regulation. (See, e.g., *Johnson v. State* [1968] 69 Cal 2d 782, 790-93; *Bacich v. Board of Control* [1943] 23 Cal 2d 343 [disregarding concerns of Chief Justice Traynor in dissent].) Query whether California is denying its property owning citizens equal protection of the law by applying the "chilling" argument only in the field of land use regulation.

5. THE CONSTITUTION PROHIBITS MEETING LEGITIMATE GOVERNMENTAL OBJECTIVES BY VIOLATING THE RIGHTS OF INDIVIDUAL CITIZENS

It may be suggested that the County has recognized a problem, accepted the duty to solve it, and devised a solution.

But recognition of a legitimate governmental goal does not legitimize whatever solution is chosen.

Determination of a legitimate governmental objective is the first step, not the last. For, if there is no legitimate objective, the action is void. If there is a legitimate objective, the means chosen to achieve it must be subjected to scrutiny to determine whether they are Constitutional. As pointedly noted in a recent opinion, "... a municipality has no discretion to violate the Federal Constitution; its dictates are absolute and imperative." (*Owen v. City of Independence* [1980] 445 US 622, 649)

The point has been repeatedly made by this Court. For example, in *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 US 419, this Court was faced with a statute designed to facilitate communication via cable TV. The state required landlords to permit the installation of cables and announced that \$1 was normally just compensation for any taking effected by this action. The City of New York urged, and the state courts agreed, that the objective was legitimate under the police power, and thus beyond Constitutional challenge.

This Court reversed, concluding that recognition of a valid police power objective was only half of the case. The other half dealt with the means chosen to attain it:

"The Court of Appeals determined that §828 serves the legitimate public purpose of 'rapid

development of and maximum penetration by a means of communication which has important educational and community aspects,' and thus is within the State's police power. We have no reason to question that determination. *It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid.*" (Loretto, 458 US at 425; emphasis added and citations omitted.)

The same conclusion appears in *Kaiser Aetna v. U.S.* (1979) 444 US 164. There, the Corps of Engineers decreed that a private marina must be open to the public. That this Court disagreed is old news. What remains pertinent, however, is the Court's analysis of the relationship between legitimate government objectives and compensation:

"In light of its expansive authority under the Commerce Clause, there is *no question* but that Congress could assure the public a free right of access to the Hawaii Kai Marina if it so chose. Whether a statute or regulation that went so far amounted to a taking, however, is *an entirely separate question.*" (*Kaiser Aetna*, 444 US at 174; emphasis added; citations and footnote omitted.)⁴⁹

The issue was also dealt with in *U.S. v. Security Industrial Bank* (1982) 459 US 70, where, by urging retroactive application of bankruptcy legislation, debtors attempted to evade liens properly filed against their properties. The United States intervened in support of the

⁴⁹ See also *Delaware, L. & W. R. Co. v. Morristown* (1928) 276 US 192, 193:

"But, assuming that under the circumstances the creation of the public hack stand would be a proper exertion of the police power, *it does not follow* that the due process clause of the 14th Amendment would not safeguard to the owner just compensation for the use of its property. [Citation.]" (Emphasis added.)

debtors, urging retroactivity because it was "rational" and thus within the power of Congress to pass such retroactive laws. This Court was unmoved:

"... however rational the exercise of the bankruptcy power may be, that inquiry is *quite separate from the question* whether the enactment takes property within the prohibition of the Fifth Amendment." (*Security Indus. Bank*, 459 US at 75; emphasis added.)

In a similar vein, of course, are cases such as *Ruckelshaus v. Monsanto Co.*, (1984) 467 US 986, 81 L Ed 2d 815, *Dames & Moore v. Regan*, (1981) 453 US 654, and the *Regional Rail Reorganization Act Cases* (1974) 419 US 102. In each of these cases, the Court was faced with the claim that Congress, in pursuit of legitimate goals, had taken private property in violation of the Constitution. In each, the Court directed the property owners to the Claims Court to determine whether these exercises of legislative power, though legitimate, nonetheless required compensation.⁵⁰

The lesson of these cases is that those who seek to portray the "police" power and the "eminent domain" power as entirely disconnected are mistaken.⁵¹

⁵⁰ *Goldblatt v. Hempstead* (1962) 369 US 590 is not to the contrary. There, no claim was made that the regulation even reduced the value of the property. (369 US at 594) Thus, no taking was alleged. Here, a taking was alleged (JA 12) and the County never challenged that allegation below. As this Court explained in *Penn Central Transp. Co. v. City of New York* (1978) 438 US 104, 127:

"It is, of course, implicit in *Goldblatt* that a use restriction on real property may constitute a 'taking' . . . if it has an unduly harsh impact upon the owner's use of the property."

⁵¹ Many scholars have noted the erroneous nature of arguments which attempt to isolate these "two powers" from each other. Professor Waite called the distinction "illusory." (Waite, *Governmental Power and Private Property* [1967] 16 Cath UL Rev 238, 292) Professor Michelman called it "wordplay." (Michelman, *Property*, (continued)

The pre-eminent text on eminent domain came closer to the mark when it concluded that, "... the police power is but another name for the power of government." (1 Nichols, *The Law of Eminent Domain* [3d rev. ed 1975] §1.42[7] at 1-208 to 1-209). Recalling that the goal of the Bill of Rights was to curb "the power of government" (see, e.g., *Stanley v. Illinois* [1972] 405 US 645, 646; *Boddie v. Connecticut* [1971] 401 US 371, 375-76; Note, *Developments in the Law — Zoning* [1978] 91 Harv L Rev 1427, 1486), the same text recognizes that a legitimate police power regulation may go so far as to constitute a taking which requires compensation. (1 Nichols, *The Law of Eminent Domain* [3d rev. ed. 1975] §1.42[7] at 1-209)⁵²

Thus, the "police" power and the "eminent domain" power are not separately existing entities, but overlapping segments on a continuum of governmental power. While there are certainly some regulations (at the end of the spectrum) which do not take private property, there are others (as the exercise moves further along the spectrum)

(ftn. continued)

Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law [1967] 80 Harv L Rev 1165, 1186) Professor Van Alstyne referred to it as "circular reasoning" and "empty rhetoric." (Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria* [1971] 44 S Cal L Rev 1, 2)

⁵² The point was plainly expressed recently by the Court of Appeals for the Federal Circuit, much of whose time is spent adjudicating taking cases:

"[i]n such cases the characteristic feature is the defendant's use of *rightful* ... regulatory rights to control and prevent exercise of [private] ownership rights the defendant is unwilling to purchase and pay for." (*Florida Rock Indus., Inc. v. U.S.* [Fed Cir 1986] 791 F 2d 893, 899; quoting with approval; emphasis, the Court's.)

See also *Mattoon v. City of Norman* (Okla 1980) 617 P 2d 1347, 1349; *Knight v. City of Billings* (Mont 1982) 642 P2d 141, 145-46 *San Antonio River Auth. v. Garrett Bros.* (Tex Civ App 1975) 528 SW 2d 266, 273.

which involve the Fifth Amendment's just compensation guarantee. And, indeed, that seems the clear message of this Court in *Pennsylvania Coal Co. v. Mahon* (1922) 260 US 393, where it was held that a police power regulation which goes "too far" is, in fact, a taking within the meaning of the just compensation clause of the Constitution.⁵³

This interpretation of *Pennsylvania Coal* was utilized in *Hamilton Bank*, where the Court said that its inquiry in a regulatory taking case was designed "... to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession ..." (87 L Ed 2d at 174), and reiterated in *MacDonald*, 91 L Ed 2d at 295.⁵⁴

In other cases, this Court has continued to emphasize the congruent, non-segregated nature of these "two" powers. In *Hawaii Housing Auth. v. Midkiff* (1984) 467 US 229, 81 L Ed 2d 186, the powers were virtually equated when the Court held that "the 'public use' requirement [in eminent domain] is thus coterminous with the scope of a sovereign's police powers." (81 L Ed 2d at 197) The *Midkiff* formulation was applied that same Term in the context of inverse condemnation in *Ruckelshaus v. Monsanto Co.* (1984) 467 US 986, 81 L Ed 2d 815, 839.

⁵³ As this Court had noted a year earlier in *Block v. Hirsh* (1921) 256 US 135, 156, "... there comes a point at which the police power ceases and leaves only that of eminent domain ..." See also Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls* (1983) 15 Rutgers L Rev 15, 38.

⁵⁴ This is also the clear implication of *Agins II*, in which this Court said that a regulatory taking occurs *either* if the regulation fails to advance a legitimate state interest *or* if it denies the owner economically viable use of his land. (*Agins II*, 447 US at 260) The point was reiterated recently in *Riverside Bayview*, 88 L Ed 2d at 426. Under that formulation, a *legitimate* police power action is a taking if it denies economically viable use of property.

Midkiff merely up-dated the Court's thirty-year-old holding in *Berman v. Parker* (1954) 348 US 26, where the Court had a clear view of the coextensiveness and interrelationship of the "two" powers:

"We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts.

* * *

"... If those who govern the District of Columbia decide that the Nation's Capitol should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

* * *

"The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking." (*Berman*, 348 US at 32-33, 36, emphasis added.)⁵⁵

The same is true here. That it may be a valid goal of the County of Los Angeles to engage in flood control is but one of the questions involved. The Los Angeles County Board of Supervisors is not writing on a clean slate, free to create a new world in its image without legal constraints. The slate already contains much writing. Among the things written are that property may be privately owned and that that ownership is Constitutionally protected.⁵⁶

⁵⁵ The Ninth Circuit Court of Appeals has expressly applied *Berman* in this manner:

"It is clear from *Berman* that a governmental agency acting pursuant to the State's police power must pay just compensation for any taking it effects. Therefore, assuming *arguendo*, that Agency in the instant case exercised legitimate police power, it still must pay for its taking of Elks' property." (*Richmond Elks Hall Assn v. Richmond Redevelopment Agency* [9th Cir 1977] 561 F 2d 1327, 1332)

⁵⁶ The Supreme Judicial Court of Massachusetts got to the heart of
(continued)

There are thus two questions which must be addressed in this type of case:

- Is the governmental objective within the ambit of the police power?
- If so, does the proposed solution violate the Constitutional rights of some citizens?

No challenge is raised to the first issue. First Church concedes that the general goal of flood protection is laudable.⁵⁷ To legally achieve that goal by preventing all

(ftn. continued)
the matter when it stated:

"The [governmental entities] argue as though all that need be done is to demonstrate a public purpose and then no regulation . . . can be too extreme. . . .

"In this conflict between the ecological and the constitutional, it is plain that neither is to be consumed by the other. It is the duty of the department of conservation to look after the interests of the former, and it is the duty of the courts to stand guard over constitutional rights." (*Commissioner of Natural Resources v. S. Volpe & Co.* [Mass 1965] 206 NE 2d 666, 671)

⁵⁷ This does not, of course, validate any course of action chosen by the County to provide flood control. Please recall, in its presentation to the California courts, the County did *not* seek to justify its actions as being necessary. Rather, it claimed that the facts regarding the ordinance and its adoption were "irrelevant," as no cause of action for just compensation was permissible. (JA 21-22) Thus, case does not involve such authorities as *Mugler v. Kansas* (1887) 123 US 623, *Hadacheck v. Sebastian* (1915) 239 US 394, or *Reinman v. Little Rock* (1915) 237 US 171. In those cases, government agencies sought to preclude uses of property which caused injury to users of other property. The justifications for the prohibitions were plainly placed in issue and litigated. Not so here. The County *never* raised such issues below. The *only* argument made by the County was that just compensation is *never* an appropriate remedy for a regulatory taking. (JA 22) Thus, unlike, *Mugler*, *Hadacheck*, and *Reinman*, the allegation of a taking is presumed at bench. The only issue is what remedy is appropriate for the taking.

use of property which has, for more than two decades, been devoted to beneficial uses, is quite another matter. As Professor Van Alstyne aptly put it:

"[L]and use regulations may be constitutionally suspect if so narrowly conceived, with respect to permissible uses, as to render the subject property virtually valueless for normal private purposes while permitting a few uses that appear to be calculated to promote broad community benefits of a kind which could also be readily achieved through an exercise of the power of eminent domain. For example, *flood plain developmental restrictions, enacted to facilitate a community flood control and storm drainage program*, have sometimes been held invalid in the absence of carefully drafted provisions designed to permit maximum private utilization of the subject property for purposes not inconsistent with flood control objectives." (Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria* [1970] 44 S Cal L Rev 1, 24-25; emphasis added)⁵⁸

⁵⁸ Professor Van Alstyne cites in support of this precept *Dooley v. Town of Fairfield* (Conn 1964) 197 A 2d 770; *Morris County Land Imp. Co. v. Township of Parsippany-Troy Hills* (NJ 1963) 193 A 2d 232; and *Hager v. Louisville & Jefferson County* (Ky 1953) 261 SW 2d 619). More recent flood plain zoning cases include *Annicelli v. Town of South Kingstown* (RI 1983) 463 A 2d 133; *MacGibbon v. Board of Appeals* (Mass 1961) 200 NE 2d 254; *State v. Johnson* (Me 1970) 265 A 2d 711; and *Mattoon v. City of Norman* (Okla 1980) 617 P 2d 1347.

Plainly, Mill Creek (which runs through the middle of Lutherglen and whose overflow swept away the camp buildings) is treated by the County as a flood control channel. It leads to a reservoir behind Big Tujunga Dam. (RT 869-70) Whenever private property owners sought to improve property bordering Mill Creek, they were required — as a condition of approval — to pave the channel adjacent to their property and construct channel improvements. (RT 434-46, 395, 748; see RT 944-45.) The effect of the County's building restriction is to condemn Lutherglen to use as a *de facto* part of the Mill Creek channel.⁵⁹ To do that, by prohibiting all use and offering no compensation, offends the Fifth Amendment.

Regardless of the propriety of the governmental goal, the route to its solution must conform to the Constitution, not circumvent it. (Note, *Developments in the Law — Zoning* [1978] 91 Harv L Rev 1427, 1462) That it might cost the County's taxpayers to comply with the Constitution is irrelevant. As this Court put it in *Watson v. Memphis* (1963) 373 US 526, 537:

"[V]indication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them."

⁵⁹ Thus, in a significant way, the case resembles an attempt to compel use of the property as part of a public project, something which historically has required compensation.

CONCLUSION

It is time for resolution. Local governments and all who deal with them need to know what the rules are. The non-decisive litigation of this decade has harmed many and disillusioned more.

The law in California is in turmoil. While the Ninth Circuit Court of Appeals recognizes that California's rule of no compensation violates this Court's interpretation of the Fifth Amendment (*In re Aircrash in Bali* [9th Cir 1982] 684 F 2d 1301, 1311, n 7; *Martino v. Santa Clara Valley Water Dist.* [9th Cir 1983] 703 F 2d 1141, 1148), that same court persists in ordering abstention in land use cases in the hope that the California Supreme Court will clean its own house. (*Bank of America v. Summerland County Water Dist.* [9th Cir 1985] 767 F 2d 544, 547)

But the California rule will not change *sua sponte*. In the two cases it has considered on the merits, the California Supreme Court has made its position clear. (*Agins I*, 24 Cal 3d at 276-277; *Furey v. City of Sacramento* [1979] 24 Cal 3d 862, 871).⁶⁰ It has declined to review other Court of Appeal decisions. The intermediate Courts of Appeal feel powerless to deviate from the California Supreme Court's rule. (*E.g.*, *Aptos Seascope Corp. v. County of Santa Cruz* [1982] 138 Cal App 3d 484, 492-493; *Gilliland v. County of Los Angeles* [1981] 126 Cal App 3d 610, 617; the case at bench (JS App. A, p A16.)

⁶⁰ That position was confirmed recently in *Baker v. Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 Cal 3d 862, 867, n 4:

"The instant case does not involve allegations of unreasonable zoning or regulatory permit activity — the remedy for which, of course, is not an inverse condemnation suit for damages, but declaratory relief or mandamus. [Citing *Agins I*.]"

The decision of the Court of Appeal in this case is a plea for this Court to act decisively:

"We conclude that *because the United States Supreme Court has not yet ruled on the question of whether a state may constitutionally limit the remedy for a taking to nonmonetary relief, this court is obligated to follow Agins[I].*" (JS App A, p A16; emphasis added.)

First Church joins in that plea and prays that this court reverse the judgment and instruct California that the U.S. Constitution requires that compensation be an available remedy for a regulatory taking of property.

Respectfully submitted,

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MOTION

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CLERK

13
No. 85-1199

In the Supreme Court of the United States

October Term, 1986

FIRST ENGLISH EVANGELICAL LUTHERAN
CHURCH OF GLENDALE, A California corporation,

Appellant,

v.

COUNTY OF LOS ANGELES, CALIFORNIA,

Appellee.

MOTION TO DISMISS

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QUESTION PRESENTED

The question presented by this motion to dismiss is whether appellant First English Evangelical Lutheran Church of Glendale has standing to appeal to this Court under 28 U.S.C. §1257(2) where:

- (a) The validity of a state statute is not drawn in question as being repugnant to the Constitution, treaties or laws of the United States; and
- (b) A federal question was not presented or decided in the courts below.

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No. 85-1199

In the Supreme Court of the United States

October Term, 1986

FIRST ENGLISH EVANGELICAL LUTHERAN
CHURCH OF GLENDALE, A California corporation,

Appellant,

v.

COUNTY OF LOS ANGELES, CALIFORNIA,

Appellee.

MOTION OF APPELLEE LOS ANGELES COUNTY TO DISMISS

Appellee, COUNTY OF LOS ANGELES, pursuant to Rule 16.1(a) and (b) of the Rules of the Supreme Court of the United States, moves the Court to dismiss the appeal herein on the ground that this Court is without jurisdiction: (1) the issue presented to this Court is not subject to review by way of an appeal since no state statute was drawn in question on the ground of its being

repugnant to the Constitution, treaties, or laws of the United States [28 U.S.C. §1257(2)]; and (2) it is not appropriate to treat Appellant's Jurisdictional Statement as a petition for certiorari [28 U.S.C. §2103] since the sole federal question presented to this Court was never raised, preserved, or passed upon in the state courts below.¹

CONSTITUTIONAL AND STATUTORY PROVISIONS

This appeal concerns Los Angeles County Code §§ 22.44.220 and 22.44.230 and Los Angeles County Ordinance No. 11,855 which were adopted in the wake of a violent flood which resulted in the massive destruction of property and the loss of 10 human lives. The texts of these statutory provisions are set forth in Appendix F to the Jurisdictional Statement (hereinafter "JS") filed herein.

Appellant has alleged in the state courts that the County Code provisions and Ordinance result in its property being taken and damaged for public use without compensation, contrary to Article 1, Section 19 of the California Constitution which provides, in relevant part, as follows:

"Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner."

¹Appellee previously filed a motion to dismiss the appeal herein or, alternatively, to affirm the judgment below based upon different grounds, to wit, the lack of a substantial federal question. Authority for the filing of this second motion appears in Stern, Gressman, and Shapiro, *Supreme Court Practice* (6th ed., 1986), p. 647: "But after . . . the Court has ruled upon the jurisdictional statement in an appeal, a motion to dismiss may be received if not based upon grounds already advanced."

STATEMENT OF THE CASE

First Church contends that the jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2) "because a local ordinance was challenged as violating the U.S. Constitution and the ordinance was upheld." (JS, p. 3) First Church further recites that the "Federal Constitutional question" was raised at the "earliest possible time and reiterated in all trial and appellate briefs." (JS, p. 4) Both assertions are unequivocally refuted by the record below.

The record presented to this Court demonstrates the total absence of any grounds for appellate jurisdiction. First Church did not challenge the validity of Los Angeles County Ordinance 11,855 (and its successor ordinances, County Code §§ 22.44.220 and 22.44.230, hereinafter "Flood Protection Ordinance") on the grounds that it was repugnant to the Federal Constitution. In fact, it did not challenge the *validity* of the Flood Protection Ordinance at all. Moreover, First Church did not present the *federal* issue to the state trial or appellate court; rather, its claims were based solely on Article 1, §19 of the California Constitution, and the Court of Appeal of California decided the case as presented to it based upon the *California Constitution* and *California case law*.

STATEMENT OF FACTS

The Second Amended Complaint filed by First English Evangelical Lutheran Church of Glendale ("First Church") (J.A. 44-53) asserts two causes of action,² the

²The Second Cause of Action is not at issue in this appeal and First Church concedes that it presents no federal question (JS, p. 2, n. 1); notably, however, the allegations asserting inverse condemnation claims are nearly identical in the two causes of action. (cf., Paragraphs 13-15 of the First Cause of Action and Paragraphs 25-27 of the Second Cause of Action.)

first of which alleges that a devastating flood inundated First Church's conference center and campground ("Lutherglen") in 1978 and, as a result,

"Lutherglen and First Church's personal property has been taken and damaged by Flood Control and the Road Department for public use without payment of compensation, contrary to Art. 1, §19 of the California Constitution." (J.A. 48)

The concluding three paragraphs of the First Cause of action state, in their entirety, as follows:

"The Ordinance

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"On January 11, 1979, the County adopted Ordinance No. 11,855, which provides:

"Sec. 1. A person shall not construct, reconstruct, place, or enlarge any building or structure, any portion of which is, or will be, located within the outer boundary lines of the interim flood protection area located in Mill Creek Canyon, vicinity of Hidden Springs, as shown on Map No. 63 ML 52, attached hereto and incorporated herein by reference as though fully set forth."

17

"Lutherglen is within the Flood Protection Area created by Ordinance No. 11,855.

18

"Ordinance No. 11,855 denies First Church all use of Lutherglen." (J.A. 49)

These quoted statements, and these alone, constitute the allegations which First Church claims challenge a local ordinance "as violating the U.S. Constitution" (JS, p. 3) and raise the "Federal Constitutional question . . . at the earliest possible time." (JS, p. 4) Clearly there is no invocation of the Federal Constitution whatsoever. Neither is there a direct, express challenge to the validity of the Flood Protection Ordinance.

The County filed a motion to strike Paragraphs 16-18 of First Church's Amended Complaint on the grounds that the California Supreme Court held in *Agins v. City of Tiburon* (1979) 24 Cal.3d 266, 269-70 that a zoning ordinance which substantially limits the use of property does not provide a basis for the recovery of damages based upon inverse condemnation. (J.A. 22) The trial court granted the County's motion, stating that pursuant to the *Agins* case, "[w]hen an ordinance, even a non-zoning ordinance, deprives a person of the total use of his lands, his challenge to the ordinance is by way of declaratory relief or possibly mandamus." (J.A. 26)³ First Church's claim, based upon the *California Constitution*, was stricken based upon *California law*.

Not only did First Church allege its claim as one based solely upon the California Constitution, but the Court of Appeal considered the claim as one based solely upon the California Constitution:

"Plaintiff filed this inverse condemnation action against the County and the Los Angeles County Flood Control District (District), claiming that the damage to Lutherglen constituted a taking without payment of

³The same allegations were stricken by the Court when First Church was granted leave to file its Second Amended Complaint. (J.A. 56)

compensation contrary to Article 1, Section 19 of the California Constitution. The First Cause of Action alleges . . . that a County ordinance adopted after the flood constituted an unconstitutional taking of property by prohibiting all use of Lutherglenn's 21 acres." (JS, App. A, p. A3-A4)

An analysis of the Court of Appeal's opinion compels the conclusion that the court was not presented with and did not decide a federal question; rather, based upon the California Constitution and California case law, it affirmed the trial court's order striking the claim for damages in inverse condemnation based upon *Agins*. The Court of Appeal's analysis is simple and straightforward:

1. Plaintiff's Second Amended Complaint sought damages for an uncompensated taking. (JS, App. A, p. A13-A14)

2. The trial court struck that portion of the Complaint, stating that under *Agins v. City of Tiburon* (1979) 24 Cal.3d 266, a person's challenge to an ordinance which deprives him of all use of his land is by way of declaratory relief or mandamus. (JS, App. A, p. A14)

3. While it could be argued that the *Agins* language cited by the trial court was dictum because of the finding that no taking occurred, the Court of Appeal agreed with Justice Scott's statement in *Aptos Seascap Corp. v. County of Santa Cruz* (1982) 138 Cal.App.3d 484, 493, that the [California] Supreme Court did not intend its discussion to be considered dictum. (JS, App. A, A14-A15)

4. The United States Supreme Court did not disapprove *Agins* in *San Diego Gas & Electric Co. v. San Diego* (1981) 450 U.S. 621. (JS, App. A, A15)

5. Thus, the court is obligated to follow *Agins* and limit the plaintiff's remedy to nonmonetary relief.

First Church's Petition For Rehearing in the Court of Appeal did not touch on any constitutional issue at all, but raised only tort issues.⁴ It was only when First Church petitioned for review in the California Supreme Court that it directly raised the federal question in connection with two of its six issues. The California Supreme Court denied review and, accordingly, did not decide the belatedly raised federal question.

⁴The total failure to even mention the claim based on the ordinance underscores the minor role which that claim played in the overall scheme of the litigation. Appellant's Opening Brief characterized its case this way:

"This case is about a devastating flood in the mountains north of Glendale which demolished a camp (Lutherglenn) operated by the plaintiff First English Evangelical Luthern Church of Glendale (First Church). The issue is whether Los Angeles County and its Flood Control District are responsible for the flood's damage."

The Opinion of the Court of Appeal had the same focus:

"This is an action for property damage caused by the flooding of plaintiff's 21-acre private campground, Lutherglenn, located at the bottom of a canyon in the Angeles National Forest, at 23200 Angeles Forest Highway, Palmdale, California." (JS, App. A, p. A2)

ARGUMENT

I.

FIRST CHURCH HAS NOT ATTACKED THE VALIDITY OF THE COUNTY FLOOD PRO- TECTION ORDINANCE

First Church never contended below that the Flood Protection Ordinance was invalid on its face or even that the ordinance was invalid as applied to First Church. Rather, First Church consistently asserted only that because the ordinance resulted in a taking of its property, just compensation must be paid. Since the County's power or authority to enact the ordinance has not been challenged, its validity is not drawn in question. *Jett Bros. Distilling Co. v. City of Carrollton* (1920) 252 U.S. 1, 64 L.Ed. 421, 40 S.Ct. 255. As stated by this Court nearly sixty years ago,

"The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed." *United States v. Lynch*, (1890) 137 U.S. 280, 285, 34 L.Ed. 700, 702, 11 S.Ct. 114.

It is First Church's burden to show affirmatively that this Court has jurisdiction, and even when it could have launched its attack upon the validity of the statute, its failure to do so leaves this Court without appellate jurisdiction. *Memphis Natural Gas Co. v. Beeler* (1942) 315 U.S. 649, 650-651, 86 L.Ed. 1090, 62 S.Ct. 857.

It is a well-established precept that appellate jurisdiction will not lie where the claim is of an unconstitutional exercise of authority under a valid ordinance. *Zucht v. King* (1922) 260 U.S. 174, 177, 67

L.Ed. 194, 43 S.Ct. 24. This is clearly illustrated in *DeBacker v. Brainard* (1969) 369 U.S. 28, 32, 24 L.Ed. 148, 153, 90 S.Ct. 163, wherein appellant claimed that because the Nebraska Code of Criminal Procedure gave the prosecutor unreviewable discretion as to whether to proceed in juvenile or criminal proceedings, petitioner was deprived of his liberty under the Fourteenth Amendment. The Court determined that the issue did not draw into question the validity of the Nebraska statute since the prosecutor's uncontrolled discretion was not the result of any explicit statutory provision, but the result of language in Nebraska case law. What First Church is actually contending herein is that as a result of the Flood Protection Ordinance, certain construction on its property has been prohibited, thereby depriving it of all use of such property *without compensation*.⁵ This result (i.e. the denial of its claimed right to compensation) is not directly attributable to the ordinance itself, but rather the result of the judicial interpretation by the California Supreme Court of Article I, Section 19 of the California Constitution.

⁵It should be noted that First Church's allegation in the Second Amended Complaint that the Flood Protection Ordinance deprives First Church of all use of Luther Glen is nothing more than a conclusory allegation totally unsupported by any fact. The record is conspicuously devoid of any evidence that First Church attempted to set aside the ordinance or determine what use could be made of Luther Glen under the terms of the ordinance. Los Angeles County Code Section 22.44.040 provides that any person who is the owner of property affected by a Flood Protection District may file a petition for establishment, expansion, or repeal of a supplemental district, and Los Angeles County Code Section 22.56.260 provides conditions for the granting of variances to permit modification of development standards when unnecessary hardship results from the strict literal interpretation of development standards. First Church did not seek relief through these available provisions, nor did it directly challenge the constitutionality of the ordinance through declaratory relief or mandamus, the remedies expressly provided under California law.

Three recent cases decided by this Court underscore the distinction between a challenge to the constitutional validity of a statute as applied (upon which appellate jurisdiction may be based) and a challenge to the constitutionality of a result obtained by applying a statute (upon which appellate jurisdiction may not rest). In *Kulko v. Superior Court of California* (1978) 436 U.S. 84, 56 L.Ed.2d 132, 98 S.Ct. 1690, appellant contended that California Code of Civil Procedure Section 410.10, which provides that a court may exercise jurisdiction on any basis not inconsistent with the Constitution of the state or the United States, deprived him of due process. This Court concluded that it did not have appeal jurisdiction because the defendant did not argue that the *statute* was unconstitutional, but argued that the due process clause precluded exercise of jurisdiction over him. The *Kulko* decision was followed in *Calder v. Jones* (1984) 465 U.S. 783, 79 L.Ed.2d 804, 104 S.Ct. 1482 wherein defendant argued that the same California jurisdictional statute, as applied to him, would be unconstitutional. This Court dismissed the appeal, reasoning that under the California statute "the question decided was whether the constitution itself would permit the assertion of jurisdiction."

Similarly, in *Richmond Newspapers, Inc. v. Virginia* (1979) 448 U.S. 555, 65 L.Ed.2d 973, 100 S.Ct. 2814, appellant argued that the Constitutional rights of the public and the press prevented the court from closing the trial under Virginia Code §19.2-266 without notice and hearing for the public and the press. The statute provided that the Court may, in its discretion, exclude from the trial any person whose presence would impair the conduct of a fair trial. This Court held that the validity of the Virginia code was not sufficiently drawn in question by appellants to invoke appellate jurisdiction,

stating that *it is essential that there be an explicit and timely insistence in the state court that a state statute is repugnant to the Federal Constitution and appellants never explicitly challenged the statute's validity.* 448 U.S. at 562, n. 4.

Accordingly, *at best*, the claims of First Church as asserted in the courts below are analogous to those raised in *Kulko*, *Calder*, and *Richmond Newspapers, Inc.* First Church asserted only that its rights under the *California* Constitution were denied because the County did not pay just compensation for what First Church contended was a taking of its property within the meaning of Article I, Section 19. At no point did First Church explicitly challenge the *validity of the ordinance* itself under *either* the *California* Constitution or the *United States* Constitution. Not only did First Church fail to directly challenge the Constitutional validity of the ordinance in the courts below, but the Court of Appeal did not consider *any* question regarding the validity of the ordinance. That court merely determined that even if First Church was denied all use of Lutherglenn, it would not have a compensation remedy under *Agins*. Hence, the *sine qua non* for appellate jurisdiction under 28 U.S.C. §1257(2) does not exist.

II.

THE FEDERAL QUESTION PRESENTED BY FIRST CHURCH WAS NOT PRESENTED OR DECIDED BELOW

Since the sole federal question urged in appellant's Jurisdictional Statement was never raised, preserved, or passed upon below, review in this Court, even by certiorari, is unavailable. For this Court to have jurisdiction, the federal question must have been both *raised* and *decided* in the state court below. *Cardinale*

v. State of Louisiana (1969) 394 U.S. 437, 438, 22 L.Ed.2d 398, 400, 89 S.Ct. 1162. There are sound reasons for this rule. Questions not raised in the court below are brought to this Court on a record which is likely to be inadequate since it was not compiled with the federal question in mind. Moreover, in the federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of the constitutional challenge. *Id.* at 439.

That this rule is still applied with rigor is demonstrated in *Webb v. Webb* (1981) 451 U.S. 493, 68 L.Ed.2d 392, 101 S.Ct. 1889, wherein this Court dismissed the writ of certiorari, noting that it was without jurisdiction. Although the petitioner in *Webb* used the phrase "full faith and credit" at several points in the proceedings below, nowhere did she cite to the U.S. Constitution or to any cases relying on the full faith and credit clause. Moreover, nowhere in the opinion of the Georgia Supreme Court was the federal question mentioned, let alone expressly passed upon. Citing numerous cases where this Court has refused to decide federal constitutional issues not decided in the state courts, this Court concluded that policy considerations require this principle to be applied with "sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below." 451 U.S. at 499.

Where, as here, a case is carried through the state courts upon arguments drawn from the state constitution alone, there is no basis for Supreme Court review. *Osborne v. Clark* (1907) 204 U.S. 565, 51 L.Ed. 619, 27 S.Ct. 319. In the *Osborne* case, there was no appeal jurisdiction where the state court opinion cited a United States Supreme Court case but said nothing about the

United States Constitution, resting its opinion solely upon the state constitution. Similarly, in *Bowe v. Scott* (1914) 233 U.S. 658, 58 L.Ed. 1141, 34 S.Ct. 769, this Court determined that there was no basis for invoking the jurisdiction of this Court where appellants alleged that a Richmond City ordinance constituted an attempt to take their rights in and to a certain alley without due process of law. This Court stated:

"But it is settled that such an averment, making no reference to the constitution of the United States, and asserting no express rights thereunder, is solely referable to the state constitution, which, in this instance, has a due process clause and affords no basis whatever for invoking the jurisdiction of this Court. 233 U.S. at 664, 58 L.Ed. at 1145.

It must appear affirmatively from the record that the decision of the federal question was necessary to the determination of the cause and actually decided. *Lynch v. New York* (1934) 293 U.S. 52, 54, 79 L.Ed. 191, 193, 55 S.Ct. 16. Jurisdiction cannot be founded on surmise nor be sustained by references in briefs. *Id.* The record below demonstrates unequivocally that the federal question was not presented to the state courts and that the Court of Appeal did not consider First Church's claim, based upon the County Flood Protection Ordinance, to be one arising under the Federal Constitution.⁶ Moreover, the federal constitutional question was not necessary to the state court's disposition of the issue, nor was the federal constitutional issue actually decided.

⁶Although Appellant's Opening Brief in the Court of Appeal contained one off-hand reference to the Fifth and Fourteenth Amendments ["The object of the owner in an inverse condemnation

The California Court of Appeal expressly states that it is obligated to follow the California Supreme Court's decision in *Agins*. While in that case the plaintiffs had alleged a taking of their property under *both* the Federal and California Constitutions, the *Agins* decision itself rested on California case precedent [*State of California v. Superior Court (Veta)* (1974) 12 Cal.3d 237, 115 Cal.Rptr. 497, 524 P.2d 1281; *Friedman v. City of Fairfax* (1978) 81 Cal.App.3d 667, 678, 146 Cal.Rptr. 687; and *HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 125 Cal.Rptr. 365, 542 P.2d 237],⁷ and state policy considerations [the need for preserving a degree of freedom in the land-use planning function and the inhibiting financial force which inheres in the inverse condemnation remedy]. The court concluded that mandamus or declaratory relief, rather than inverse condemnation, was the appropriate remedy for a "regulatory taking." Even the dissenting opinion of Justice Clark acknowledged the basis of the majority's opinion: "Their refusal [to award compensation] is grounded on their mistaken analysis of this court's earlier decision in *HFH, Ltd. v. Superior Court* (cites omitted)." 24 Cal.3d at 280.

action is to recover the just compensation to which he is constitutionally entitled when his property is taken or damaged for public use." (Cal. Const., Art. 1, §19; U.S. Const., 5th and 14th Amendments)"], the Court of Appeal properly reviewed First Church's claim as arising under the California Constitution since under well-established California law a claimed violation of a constitutional right must be raised in the trial court to preserve the issue on appeal. *Snelson v. Ondulando Highlands Corp.* (1970) 5 Cal.App.3d 243, 259, 84 Cal.Rptr. 800 (Opn. on den. of reh.); *Selleck v. Globe International, Inc.* (1985) 166 Cal.App.3d 1123, 1133, 212 Cal.Rptr. 838.

⁷Although there was a passing reference to this Court's decision in *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 67 L.Ed. 322, 43 S.Ct. 158, the court merely noted that the possibility of compensation was not even considered in that case.

Thus, the reliance by both the trial court and the Court of Appeal on the *Agins* decision of the California Supreme Court and upon the provisions of Article 1, Section 19 of the California Constitution underscore the fact that the Federal Constitutional question now being urged by appellant was never presented or decided. Although an appellant is required to raise the federal question with fair precision and in due time [*People v. Zimmerman*, (1928) 278 U.S. 63, 67, 73 L.Ed. 184, 187, 49 S.Ct. 61], First Church did not assert its federal question in any explicit manner until it raised the issue for the first time in its Petition for Review in the California Supreme Court. That was too late since the case was not accepted for review, leaving the issue undecided.

CONCLUSION

For the foregoing reasons, First Church's appeal should be dismissed for lack of jurisdiction and the judgment below be allowed to stand.

DATED: September 8, 1986.

Respectfully submitted,

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State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on September 8, 1986, I served the within *Motion to Dismiss* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

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I declare under penalty of perjury that the foregoing is true and correct. Executed on September 8, 1986, at Los Angeles, California.

Sharon L. Stewart
(Original signed)

MOTION

14
No. 85-1199

Supreme Court, U.S.

FILED

SFP 19 1986

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

October Term, 1985

**FIRST ENGLISH EVANGELICAL LUTHERAN
CHURCH OF GLENDALE**, a California corporation,

Appellant,

vs.

COUNTY OF LOS ANGELES, CALIFORNIA,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SEVEN

**OPPOSITION TO APPELLEE'S
SECOND MOTION TO DISMISS**

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QUESTIONS PRESENTED BY THE SECOND MOTION TO DISMISS

1. Does an Appellant in a regulatory taking case (in which the complaint alleges that a land use regulation deprives the Appellant of all reasonable use of its property) have standing to appeal under 28 USC §1257(2), when the Appellee asserts that the regulation was not challenged in the State courts as being repugnant to the U.S. Constitution and the Federal question was neither presented nor ruled upon in the State courts, but the record disproves that assertion by showing:

- the Complaint alleged that the regulation "... denies [Appellant] all use of [the subject property]" (JA 12) *,
- the Appellant argued in the California Superior (*i.e.*, trial) Court that the regulation took its property without compensation, in violation of the U.S. Constitution (App 1 hereto);
- the California Superior Court concluded that it was compelled to strike all allegations regarding the regulation and its impact because the decision of the California Supreme Court in *Agins v. City of Tiburon* (1979) 24 Cal 3d 266,

* The Joint Appendix will be cited "JA" and the Jurisdictional Statement will be cited "JS," as in the Appellant's Brief on the merits, filed September 9, 1986.

aff'd on other grounds (1980) 447 US 255 **
compelled the conclusion that a land use regulation which prohibits all use of land cannot give rise to an inverse condemnation action for just compensation (JA 26);

- the Appellant then urged the California Court of Appeal not to follow *Agins I*, based on the extensive analysis in Justice Brennan's four-Justice dissenting opinion in *San Diego Gas & Elec Co. v. City of San Diego* (1981) 450 US 621, as well as decisions by the Fifth, Seventh, Ninth, and Eleventh Circuit Courts of Appeals (App 2 hereto);
- the California Court of Appeal considered the impact of this Court's recent opinions (JS, App A, pp A14-A16), decided that "... the [U.S.] Supreme Court has not yet squarely reached the issue ..." (JS, App A, p A16), and therefore felt compelled to "... conclude that *because the United States Supreme Court has not yet ruled on the question* of whether a state may constitutionally limit the remedy for a taking to nonmonetary relief, this court is obligated to follow *Agins [I]*" (JS, App A, p A16; emphasis added); and

** The California Supreme Court's decision will be cited as *Agins I* and this Court's decision will be cited as *Agins II*, as in the Appellant's Brief.

- the Appellant thereafter cited to the California Supreme Court the same line of Federal Constitutional decisions and urged reconsideration of *Agins I* in their light, only to have the California Supreme Court decline to review the case?

2. May a State Supreme Court interpret and apply its own state's constitutional provisions in a manner which affords *less* protection to individuals than the comparable provisions of the U.S. Constitution?

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INTRODUCTION

The County's Second Motion to Dismiss, in addition to being tardy,¹ disregards California pleading law, and then misrepresents:

- the arguments raised by Appellant First English Evangelical Lutheran Church of Glendale (First Church) in all levels of the California court system;
- the basis for the decision of the California Court of Appeal which is brought here for review; and
- the basis for the California Supreme Court's decision in *Agins I*, which is the authority underlying the ruling at bench.

Contrary to the County's motion, First Church attacked the County ordinance as being repugnant to the U.S. Constitution in *all* state courts. The California Court of Appeal *expressly* based its decision on its analysis of this Court's post-*Agins II* actions and affirmed the trial court *only* because of the failure of this Court to definitively rule on the propriety of California's interpretation of

¹ This appeal was docketed January 15, 1986 — eight months ago. Rule 16, under which the pending motion is purportedly brought (Mot., p 1), allows 30 days for such a motion. The County filed a timely motion, which apparently failed to impress this Court, as probable jurisdiction was noted June 30, 1986. Nothing in the pending motion is based on new evidence or recent occurrences. All of the "facts" alleged were always present (though, as noted hereafter, the motion badly mis-states those "facts"). No reason is given why these arguments were not timely raised. The motion deserves denial out of hand for its lack of timeliness, and denial on the merits for its lack of merit.

Constitutional requirements in *Agins I*.²

Beyond that, the County misreads both *Agins I* and *Agins II* by asserting that *Agins I* was based solely on the California Constitution, when the opinion clearly was based on the U.S. Constitution.³

Finally, even were one to accept the County's view of *Agins I*, the motion is based on the erroneous premise that a state court is free to interpret its own state constitutional provisions in a way which affords *less* protection to individual rights than parallel provisions of the U.S. Constitution. That has never been the law.

The County's motion is ill-taken. It deserves denial.

I

**THE COMPLAINT ALLEGED FACTS,
AS REQUIRED BY STATE PLEADING
LAW. ALLEGATION OF SUCH FACTS
PERMITS RAISING ANY THEORY OF
RECOVERY WHICH THEY SUPPORT**

As correctly noted by the County (Mot., p 14), the Complaint alleges the contents of County Ordinance No.

² First Church apologizes for the length of this memorandum. However, in light of the County's omnipresent charge that First Church failed to attack its ordinance as being repugnant to the U.S. Constitution and thus failed to timely raise the Federal question, extensive reference to the briefs and pleadings filed by First Church seems appropriate to lay this issue to rest before oral argument and to assure this Court that the issue is properly presented for decision.

³ Reflection demonstrates that fact without even examining the *Agins I* opinion. If *Agins I* were based solely on an interpretation of the California Constitution, this Court would have had no jurisdiction to review the decision and would have dismissed the appeal, rather than ruling on the merits.

11,855 *in haec verba*⁴ and then alleges that:

"Ordinance No. 11,855 denies First Church all use of Lutherglen." (JA 12)

After that correct beginning, however, the County errs. The County asserts that these allegations do not challenge the Constitutional validity of the ordinance.

The County's error lies in its failure to understand California pleading law.

First. The relevant statute, Cal Code Civ Proc §425.10(a), requires a complaint to contain "... a statement of the *facts* constituting the cause of action in ordinary and concise language." (Emphasis added.)

California courts have always construed this statute to mean that only *ultimate facts* (as distinguished from evidentiary facts or conclusions of law) are proper in a complaint. The standard explication is in *Green v. Palmer* (1860) 15 Cal 411, 415:

"First Rule. — Facts only must be stated. This means . . . the facts, as *contradistinguished from the law*, from argument, from hypothesis, and from the evidence of the facts. A *legal inference or conclusion from the facts should not be stated*; that is not the province of the pleadings under our system, which is to develop the facts. To apply the law to the facts, that is, *to draw thence legal inferences or conclusions, is the province of the Court.*" (Quoting with approval; emphasis added.)⁵

⁴ The ordinance forbids any person to "... construct, reconstruct, place, or enlarge any building or structure ..." within its boundaries, which include Lutherglen. (JA 11)

⁵ *Green*, a century old, continues to be cited by California courts as expressing California's rule. (E.g., *Aetna Life & Cas. Co. v. Ford Motor Co.* [1975] 50 Cal App 3d 49, 54.)

Thus, that First Church did not directly allege the unconstitutionality of the County ordinance was not a defect, as charged by the County (Mot., p. 5), it was required by California law. As aptly summarized in Grossman & Van Alstyne, 7 *California Practice: Pleading — Civil Actions* (1981) §867 at 449:

"The indiscriminate use of such legal characterizations as 'unlawful', 'fraudulent', 'wilful', 'wrongful', 'illegal', 'unconstitutional', 'void', 'against public policy', 'unfair', 'unjust', and the like, has been criticized on the ground that 'the salting and peppering of the declaration with vituperative epithets may serve for embellishment, but contribute no substantial increment to the cause pleaded.'" (Emphasis added; footnote citing numerous cases omitted.)

Second. If one pleads such improper matter, it may be stricken from the complaint because it adds nothing. (See Cal Code Civ Proc §436.) The legal conclusion is irrelevant to the pleading; it is the *facts* which California requires to be pled. As the California Supreme Court explained in *St. Clair v. San Francisco etc. Ry. Co.* (1904) 142 Cal 647, 650:

"The adding to or taking away of the adverbial phrase 'wrongfully and unlawfully' did not affect the cause of action pleaded — the presence of the words did not improve the complaint, and their absence did not impair its efficacy. They were mere epithets, and as said in *Going v. Dinwiddie*, 86 Cal. 633, are, 'in general, meaningless.' If the acts averred are shown to be unlawful, then this adverbial phrase is superfluous; if they are not

shown by the pleading to be unlawful, the insertion of this phrase does not make them so. *Upon the face of this complaint it appears without regard to these words that the obstruction of the street was wrongful and unlawful, in that private property may not be taken or impaired for public use without just compensation first made or paid into court for the owner.*" (Emphasis added.)⁶

Third. At the same time, the consequence of pleading the *facts* of which the plaintiff complains is that the plaintiff is free to argue *any* theory which those facts will support. (E.g., *Gressley v. Williams* [1961] 193 Cal App 2d 636, 639; *Aetna Life & Cas. Co. v. Ford Motor Co.* [1975] 50 Cal App 3d 49, 54; *Firco, Inc. v. Fireman's Fund Ins. Co.* [1959] 173 Cal App 2d 524, 529)

At bench, First Church alleged the facts (*i.e.*, that the County had passed an ordinance which denied First Church all use of Lutherglen) and prayed for just compensation.⁷

⁶ See also *Reardon v. San Francisco* (1885) 66 Cal 492, 496 [only facts are needed in inverse condemnation complaint, not conclusions such as "wrongful" and "unlawful"]; *Ohm v. San Francisco* (1891) 92 Cal 437, 450 [correct legal conclusions are "useless," incorrect conclusions are "worse than useless"].

⁷ For the first time in this litigation (in *any* court), the County asserts that First Church could have sought *repeal* of the ordinance, pursuant to Los Angeles County Code §22.44.040, or sought a variance, pursuant to Los Angeles County Code §22.56.260. Such *factual* quibbling with the state of the allegations (which — as far as relevant here — were stricken from the complaint on the County's claim that the allegations regarding the ordinance were *irrelevant*, not defective [see JA 21-22]) at *this* stage of the proceedings is outrageous. California courts refuse to permit such sandbagging:

"It is unfair for a party to withhold an objection founded upon a defect, which, if pointed out in time, might be remedied, until it is too late to correct the defect, thereby inducing an opponent to rely upon his pleading as sufficient in order that

(continued)

That is what California pleading law requires. Argument, based on legal theories and Constitutional precepts, was properly left for legal briefs. (See the Appendices attached to this memorandum, which contain the legal arguments made by First Church in all California courts.)

(ftn. continued)

he may have a fatal objection. Such a course is a fraud upon justice and prevents a fair trial. It is therefore not tolerated." (*Asnon v. Foley* [1930] 105 Cal App 624, 630 [quoting with approval from an earlier California Supreme Court decision].)

Moreover, as Justice Holmes put it for this Court in *Davis v. Wechsler* (1923) 263 US 22, 24:

"Whatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

The text of the two ordinances is set forth in App 5 to this Memorandum. The first (§22.44.040), which allows one to seek repeal of ordinances *in general*, can have no *practical* impact here, when the ordinance was made permanent after three years of study. Plainly, the County would not then immediately have repealed it. For further discussion of the futility of such a request, *see* the Brief of California Building Industry Association As Amicus Curiae in Support of Appellant, pp 14-19.

The second (§22.56.260) deals with variances *in general* (not from the ordinance at bench). Moreover, as discussed in Appellant's Brief, p 15, n 24, state law prohibits a variance for a change of *use*, the relief First Church needs. Rather, §22.56.260 complies with state law and permits a variance only for minor tinkering with setback lines, building height, sign regulations, and the like, none of which addresses the total building prohibition at bench.

IN ALL STATE COURTS, FIRST CHURCH DIRECTLY ATTACKED THE COUNTY ORDINANCE AS BEING REPUGNANT TO THE U.S. CONSTITUTION

The County's motion is based on the oft-repeated twin assertion that First Church never attacked the County ordinance as being repugnant to the U.S. Constitution and thus failed to timely and directly raise the Federal question in the state courts.

The County is wrong.

Attached to this Opposition as Appendices 1, 2, 3, and 4, respectively, are the relevant portions of the following briefs filed by First Church in the California courts:

1. Memorandum of Points and Authorities in Opposition to Demurrers and Motions to Strike, filed in the trial court October 29, 1979.
2. Appellant's Opening Brief, filed in the California Court of Appeal April 26, 1984.
3. Appellant's Reply Brief, filed in the California Court of Appeal December 26, 1984.
4. Petition for Review, filed in the California Supreme Court August 5, 1985.

Those briefs plainly show that the ordinance's repugnancy to the U.S. Constitution was directly argued

and that the Federal question was raised in *all* California courts at *all* stages of these proceedings.⁸

First, the trial court:

In opposing the County's motion to strike all references to its use-stultifying ordinance (*see* JA 21-22), First Church argued:

"A temporary regulation can be a taking for which the U.S. Constitution requires compensation:

"Although in this case plaintiff's land was regulated (*i.e.*, by zoning) rather than confiscated, regulation may nevertheless amount to a taking. [Citation].'" (*6th Camden Corp. v. Evesham T., Burlington Cty.* [1976] 420 F Supp 709. *See also Gordon v. City of Warren* [6th Cir 1978] 579 F 2d 386.)

"The ordinance takes First Church's property.

"The Constitution does not permit Los Angeles County to regulate First Church's use of its property out of existence." (App 1)

⁸ The attached briefs plainly demonstrate the error in the County's assertion that "It was only when First Church petitioned for review in the California Supreme Court that it directly raised the federal question ..." (Mot., p 7) The Federal question was raised in *all* courts. Nor is there any truth to the County's assertion that this case was "... carried through the state courts upon arguments drawn from the state constitution alone ..." (Mot., p 12) The arguments were plainly based on *this* Court's interpretation of the Fifth Amendment.

Second, the California Court of Appeal:

In its Appellant's Opening Brief, First Church told the California Court of Appeal about the holding of *Agins I* and then explained why *Agins I* ought not control:

"... Federal law after *Agins [I]* has shown that an inverse condemnation remedy is constitutionally compelled." (App 2, p A2)

There followed a discussion of this Court's three opinions in *San Diego Gas & Elec. Co. v. City of San Diego* (1981) 450 US 621 (App 2, p A3),⁹ as well as two decisions of the Ninth Circuit Court of Appeals which concluded that the California Supreme Court's decision in *Agins I* was contrary to this Court's interpretation of the Fifth Amendment. (*In re Aircrash in Bali* [9th Cir 1982] 684 F 2d 1301, 1311, n 7; *Martino v. Santa Clara Valley Water Dist.* [9th Cir 1983] 703 F 2d 1141, 1148) (App 2, pp A6-A7)

In its Appellant's Reply Brief in the California Court of Appeal, First Church reiterated the arguments noted above and added a discussion of this Court's intervening decision in *Ruckelshaus v. Monsanto Co.* (1984) 467 US 986. (App 3, p A12)¹⁰

Finally, the California Supreme Court:

The County concedes that the Federal question was "directly raised" by First Church in the California Supreme

⁹ This discussion included reference to the six U.S. Court of Appeals decisions which had adopted the reasoning of Justice Brennan's dissent. (App 2, pp A5-A6, n 17)

¹⁰ Contrary to the County's assertion, the briefs demonstrate that the argument in the Court of Appeal contained more than "... one off-hand reference ..." (Mot., p 13) to Federal Constitutional law.

Court. (Mot., p 7) Thus, lengthy discussion of that brief (App 4) is not necessary. It suffices to note that the arguments there raised were the same as those raised in the California Court of Appeal. (*Compare* App 2 with App 4.)¹¹

Thus, regardless of the County's wish to distort the facts, the record plainly shows that First Church directly attacked the County ordinance as being repugnant to the U.S. Constitution, and did so in *all* California courts, thus timely and properly raising the Federal question.¹²

¹¹ As the arguments in those two courts were, in large part, verbatim, and as the County concedes that the Federal question was "directly raised" in the California Supreme Court (Mot., p 7), it is difficult to comprehend the County's argument that the Federal question was not equally "directly raised" in the California Court of Appeal. (*See* Mot., p 15.)

¹² The County's argument that First Church failed to attack the ordinance's "validity" (Mot., pp 3, 5, 8-11) represents a failure to understand this Court's decisions under the "just compensation" clause of the Fifth Amendment.

As discussed in First Church's Appellant's Brief on the merits, this Court has consistently held that a regulation can be "valid" (that is, addressed to a proper subject of the "police" power) and still require just compensation to satisfy the Fifth Amendment's "just compensation" clause if private property is taken in the process. (Appellant's Brief, pp 39-47, discussing *Loretto v. Teleprompter Manhattan CATV Corp.* [1982] 458 US 419, 425; *Kaiser Aetna v. U.S.* [1979] 444 US 164, 174; and *Delaware, L. & W. R. Co. v. Morristown* [1928] 276 US 182, 193, among others. *See also* Brief of American College of Real Estate Lawyers, as Amicus Curiae in Support of Appellant, pp 29-33.)

The County's argument also disregards this Court's consistent view that, when faced with a statute or ordinance which *would* be invalid if there were no way to supply "just compensation" under the Fifth Amendment, the proper course is to hold that the statute or ordinance is "valid" because a provision for compensation is judicially inferred. (Appellant's Brief, pp 19-21, discussing the line of cases beginning with *Hurley v. Kincaid* [1932] 285 US 95, 104, and continuing through *U.S. v. Riverside Bayview Homes* [1985] 474 US ___, 88 L Ed 2d 419, 429. *See also* the Brief of California Building Industry Association as Amicus Curiae in Support of Appellant, pp 20-23.)

(continued)

3

THE FEDERAL QUESTION WAS
RULED ON BY THE CALIFORNIA
COURT OF APPEAL

The County makes the curious assertion that the California Court of Appeal never addressed the Federal question (*i.e.*, whether the Fifth Amendment and this Court's interpretation of it require just compensation for a regulatory taking, thereby invalidating the California Supreme Court's decision in *Agins I*). (*See* Mot., p 11 *et seq.*)

The County's assertion is "curious" because it is belied by the California Court of Appeal's opinion:

"Plaintiff further argues that the trial court's reliance on the language in *Agins I* was misplaced because the United States Supreme Court disapproved *Agins I* in *San Diego Gas & Electric Co. v. San Diego* (1981) 450 U.S. 621.

* * *

"Plaintiff contends that despite the Supreme Court's dismissal of the appeal in *San Diego Gas*, a combined total of five justices through the dissenting and concurring opinions disapproved the view that a state may limit the remedy available for

(ftn. continued)

Thus, in this context, an argument that an ordinance takes property without compensation is an attack on its validity, as only compensation can validate the ordinance.

a taking to nonmonetary relief." (JS, App A, pp A15-A16)

As an intermediate appellate court, the Court of Appeal simply felt powerless (as others had before)¹³ to disregard an express ruling by its State Supreme Court, which *this* Court had twice declined (for procedural reasons) to overrule. (JS, App A, p A16)

The Federal question was plainly decided by the California Court of Appeal. First Church is asking this Court to exercise its plenary jurisdiction to answer the question in a manner which conforms to the dictates of the Fifth Amendment.

4

APPELLATE JURISDICTION EXISTS

As demonstrated earlier, First Church *did* raise the Federal question in the California courts and *did* challenge the County's ordinance as being repugnant to the U.S. Constitution. The California Court of Appeal *did* rule on the issue. Thus, even under the authorities relied on by the County, appellate jurisdiction exists.

Moreover, this Court has traditionally exercised its appellate jurisdiction to review land use regulations when their Constitutional defect is that they take property for public use without just compensation. Thus, under settled decisions of this Court, appellate jurisdiction exists.

¹³ *E.g., Aptos Seascope Corp. v. County of Santa Cruz* (1982) 138 Cal App 3d 484, 493; *Gilliland v. County of Los Angeles* (1981) 126 Cal App 3d 610, 617.

A

Appellate Jurisdiction Exists Because The Federal Question Was Raised

Because First Church *did* challenge the County's ordinance as being repugnant to the U.S. Constitution and thus *did* timely raise the Federal question, this Court's appellate jurisdiction is clear. (*E.g., Cohen v. California* [1971] 403 US 15, 18 [plaintiff claimed that statute infringed rights guaranteed by First and Fourteenth Amendments]; *McCarty v. McCarty* [1981] 453 US 210, 219, n 12 [plaintiff argued that Federal law precluded application of contrary state law]; *Dahnke-Walker Milling Co. v. Bondurant* [1921] 257 US 282, 290 [plaintiff argued that statute was unconstitutional under Commerce Clause of U.S. Constitution].)¹⁴

¹⁴ The cases discussed by the County at pp 8-11 of its motion are not to the contrary.

First, the argument based on them disregards this Court's settled way of examining statutes and ordinances which address a legitimate subject of regulation but — because they fail to provide compensation — are repugnant to the Fifth Amendment's just compensation clause. (See p 10, n 12 herein)

Second, in addition to containing the doubletalk "distinction" between "the constitutional validity of a statute as applied" and "the constitutionality of a result obtained by applying a statute" (only the first of which is said to invoke this Court's appellate jurisdiction), this portion of the County's motion discusses cases which are not on point. *Kulko v. Superior Court* (1978) 436 US 84 and *Calder v. Jones* (1984) 465 US 783, both dealt with the same statute. It merely provided that the state courts could exercise jurisdiction "on any basis not inconsistent with the Constitution . . ." (Cal Code Civ Proc §410.10) Thus, there was nothing wrong with the statute. At bench, there is something wrong with the ordinance: it takes private property for public use without compensation. Likewise, in *Richmond Newspapers, Inc. v. Virginia* (1980) 448 US 555, no complaint was aimed at the statute. The problem was the trial court's exercise of discretion under the statute.

(continued)

B

Appellate Jurisdiction Exists Because the Federal Question Was Ruled on by the California Court of Appeal

As shown above, the California Court of Appeal *did* rule on the Federal question. It expressly examined the law developed by this Court involving the Fifth Amendment's "just compensation" clause (JS, App A, pp A15-A16) and ruled against First Church because of its belief that "... the United States Supreme Court has not yet ruled on the question of whether a state may constitutionally limit the remedy for a taking to nonmonetary relief ..." (JS, App A, p A16)

On that record, this Court's appellate jurisdiction is clear. (E.g., *Japan Line, Ltd. v. County of Los Angeles* [1979] 441 US 434, 440-441 [statute upheld by state court against challenge that it was repugnant to Commerce Clause of the U.S. Constitution]; *Oregon v. Hass* [1975] 420 US 714, 719-720 [fact that state court analyzed and distinguished U.S. Supreme Court case shows Federal basis of state court decision]; *Orr v. Orr* [1979] 440 US 268, 274, 75 [Federal question ruled on by state court even though not directly raised by pleadings]; *Oregon v. Kennedy* [1982] 456 US 667, 671 [state court analysis of U.S. Supreme Court decisions shows ruling on Federal question even though state grounds "intermixed"]; see *Charleston Fed. Sav. & L. Assn. v. Alderson* [1945] 324 US 182, 185-187 [time of raising Federal question irrelevant if state court rules on it; certiorari proper even if appeal is not].)¹⁵

(ftn. continued)

The County's cases are factually off point. They provide no assistance.

¹⁵ Moreover, the fact that the Court of Appeal *did* consider and reject First Church's argument based on decisions of this Court and
(continued)

C

In Land Use Cases, This Court Has Traditionally Exercised Its Appellate Jurisdiction to Review Claims That Regulations Effected a Taking of Private Property Without Compensation

In virtually all of the land use regulatory taking cases decided by this Court (including all three recent cases arising in California to test the *Agins I* rule), this Court has exercised its appellate jurisdiction. In each of the following appeals, the property owner claimed a taking without compensation: *Agins v. City of Tiburon* (1980) 447 US 255; *San Diego Gas & Elec. Co. v. City of San Diego* (1981) 450 US 621; *MacDonald, Sommer & Frates v. County of Yolo* (1986) 477 US ___, 91 L Ed 2d 285; *Penn Central Transp. Co. v. City of New York* (1978) 438 US 104; *Goldblatt v. Hempstead* (1962) 369 US 590; *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 US 410; *Pennsylvania Coal Co. v. Mahon* (1922) 260 US 393.

In all but one of these appeals,¹⁶ this Court decided the

(ftn. continued)

the U.S. Courts of Appeals interpreting the Fifth Amendment's "just compensation" clause renders moot the question of when and how the Federal question was raised. As stated in the only authority cited by the County for the tardy making of its motion (Mot., p 2, n 1):

"Once it is clear that the highest state court has actually passed on the federal question, any inquiry into how or when the question was raised in the state courts is considered irrelevant to the exercise of the Court's jurisdiction. An irrebuttable presumption is created that the federal question was timely and properly raised." (Stern, Gressman & Shapiro, *Supreme Court Practice* [6th ed. 1986] §3.22 at 158; footnote omitted.)

¹⁶ In *San Diego Gas*, the appeal was dismissed for what a 5-4 majority of this Court deemed to be the absence of a final state court judgment.

appeal, thus exercising its appellate jurisdiction by affirming four and reversing two.

This Court's practice in land use cases makes it clear that the proper way to review a regulatory taking case is by appeal.

5

THE COUNTY MIS-STATES THE
BASIS OF THE CALIFORNIA
SUPREME COURT'S DECISION IN
AGINS I

In another curious argument, the County urges that the California Supreme Court's decision in *Agins I* (the compelling force behind the opinion at bench) was *not* based on the U.S. Constitution or this Court's interpretation of it, but on the California Constitution. (Mot., p 14) According to the County, the only mention of this Court's decisions in *Agins I* was a "passing reference" to *Pennsylvania Coal Co. v. Mahon* (1922) 260 US 393. (Mot., p 14, n 7)

Wrong.

Agins I begins with a quotation of the Fifth Amendment. (24 Cal 3d at 273) It then announces what "property" is protected by the Fifth Amendment by quoting from this Court's decision in *U.S. v. General Motors Corp.* (1945) 323 US 373. (24 Cal 3d at 273)

It then explains how property is protected by the Constitution by discussing for half a page (somewhat more than a "passing reference") this Court's decision in *Pennsylvania Coal*. (24 Cal 3d 274)

After brief discussion of an earlier opinion of its own (and noting Professor Ellickson's disagreement with its conclusion),¹⁷ *Agins I* returns to this Court's decisions for a discussion of *Euclid v. Ambler Co.* (1926) 272 US 365. (24 Cal 3d at 275)

A fair reading of *Agins I* thus reveals that it is firmly rooted in what the California Supreme Court thought was this Court's Fifth Amendment jurisprudence.¹⁸

The County even goes so far as to say that Justice Clark's dissenting opinion shows that *Agins I* involved the California Constitution and not the U.S. Constitution. (Mot., p 14)

Wrong again.

Justice Clark's dissenting opinion strongly argued that Federal Constitutional law was contrary to *Agins I*, concluding:

"It is clear that compelling federal authority requires compensation for the taking alleged by plaintiffs in this case. [Citing and quoting numerous decisions of this Court and lower Federal courts]" (24 Cal 3d at 282 [Clark, J., dissenting])

Moreover, on review, this Court clearly viewed *Agins I* as being based on the Fifth Amendment. (*See Agins II*, 447 US at 257, 258, 259, 260, 263.)

¹⁷ Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis* (1979) 86 Yale L.J. 385, 507-11.

¹⁸ This was simply a continuation of a long-standing practice of the California Supreme Court to treat deprivations of property as questions of Federal law. (*See, e.g., Brookes v. City of Oakland* [1911] 160 Cal 423, 427.) *Compare Michigan v. Long* (1983) 463 US 1032, 1043-44 [absent plain statement by state court that decision is based solely on state grounds, it is presumed that Federal grounds discussed in the opinion controlled the decision].

Of course, if the County were right, and *Agins I* had been based on the California Constitution and not the U.S. Constitution, plainly no Federal question would have been involved and this Court would have dismissed the appeal rather than dealing with it on the merits.

6

A STATE COURT MAY NOT INTERPRET STATE LAW IN A WAY WHICH PROVIDES LESS PROTECTION TO INDIVIDUALS THAN THE U.S. CONSTITUTION

The County's assertion that *Agins I* was based solely on the California Constitution (Mot., p 14) is not only erroneous (as demonstrated earlier), it self-destructs.

As shown in First Church's Appellant's Brief on the merits, this Court has always held that just compensation is mandated by the Fifth Amendment when a government agency takes private property for public use. (Appellant's Brief, pp 19-21) Numerous U.S. Courts of Appeals have held that this rule applies to regulatory, as well as physical, takings of property. (Appellant's Brief, pp 8-9)

The County's argument is premised on the theory that California courts are free to interpret the California Constitution in a way which *denies* this Fifth Amendment protection.

That has never been the law.

As this Court firmly held in *Sibron v. New York* (1968) 392 US 40, 60-61:

"New York is, of course, free to develop its own law of search and seizure to meet the needs of local law enforcement, [citation] and in the process it may call the standards it employs by any names it may choose. It may not, however, authorize police conduct which trenches upon Fourth amendment rights, regardless of the labels which it attaches to such conduct. The question in this Court upon review of a state-approved search or seizure 'is not whether the search [or seizure] was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment.'"

Thus, while allowing states substantial freedom to adopt and enforce their own constitutions and statutes, this Court has made it clear that the requirements of the U.S. Constitution establish the "minimum" protection to which all are entitled. (*Mills v. Rogers* [1982] 457 US 291, 300) The freedom which states enjoy is to provide *more* protection than the U.S. Constitution requires:

"... while the legislature was *powerless to diminish* the constitutional measure of just compensation, we are aware of no rule which stands in the way of an extension of it, within the limits of equity and justice, so as to include rights otherwise excluded." (*Joslin Mfg. Co. v. City of Providence* [1932] 262 US 668, 676-77; emphasis added; *see also PruneYard Shopping Center v. Robins* [1980] 447 US 74, 81.)¹⁹

¹⁹ See also *Oregon v. Hass* (1975) 420 US 714, 719, n 4, in which this Court "reject[ed]" a statement by the Oregon Supreme Court that it could interpret a provision of the U.S. Constitution "more restrictively than interpreted by the United States Supreme Court."

Thus, the premise of the County's motion is Constitutionally flawed. To the extent that it can be said that the California courts, through enforcement of *Agins I*, are only applying California law (in defiance of the Fifth Amendment, which forbids it), the California courts have engaged in a systematic violation of this Court's settled precept that the U.S. Constitution establishes a minimum level of protection beneath which states are forbidden to go.

CONCLUSION

The County's second motion to dismiss is fatally flawed. It is based on misunderstanding of California pleading law, mis-statement of the arguments raised by First Church in the California Courts, misconstruction of the decision of the California Court of Appeal, misrepresentation of the basis of *Agins I*, and misconception of this Court's decisions in regulatory taking cases.

Having *invoked* California pleading law in order to banish all reference to its ordinance from the case — *not* on the ground that the allegations were in any way factually *deficient*, but on the ground that they were *irrelevant* — the County cannot now discard that same body of law like a soiled shirt to suit a newly developed litigational strategy. First Church complied with California pleading law by alleging the *facts*. Those facts permit a court to draw the legal conclusion that the ordinance offends the Fifth Amendment's just compensation clause, as urged by First Church in every brief filed below.

First Church prays that the motion be denied so that the Court and the parties may devote their energies to the merits of this case, and so that a decision on the unconstitutionality of *Agins I* may finally be had.

Respectfully submitted,

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— APPENDIX 1

-A 1-

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**SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

FIRST ENGLISH EVANGELICAL)
LUTHERAN CHURCH OF GLENDALE)
a California corporation,)
)
Plaintiff,)
vs.)
COUNTY OF LOS ANGELES,)
and LOS ANGELES COUNTY FLOOD)
CONTROL DISTRICT,)
)
Defendants.)

No. C 273 634
November 1, 1979, 9:00 A.M.
Department 81

**ORIGINAL FILED
OCT 29 1979
COUNTY CLERK**

**MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO DEMURRERS AND
MOTIONS TO STRIKE**

**BY DENYING FIRST CHURCH
ALL USE OF ITS PROPERTY, THE
ORDINANCE EFFECTS A TAKING
OF THAT PROPERTY**

The ordinance which applies to First Church's Camp is *absolute* in its prohibitions. No use, not even reconstruction of the demolished facilities, is permitted on First Church's property.

A temporary taking is compensable. (*Pierpont Inn, Inc. v. State* [1969] 70 C 2d 282, 299)

A temporary loss of use is an unreasonable interference which gives rise to compensation. (Hunter and Ream, *Condemnation Practice in California* [CEB 1973] §5.20 P 112-113)

A temporary regulation can be a taking for which the U.S. Constitution requires compensation:

"Although in this case plaintiff's land was regulated (*i.e.*, by zoning) rather than confiscated, regulation may nevertheless amount to a taking. [Citation]. (*10th Camden Corp. v. Evesham TP., Burlington Co.* [1976] 420 F Supp 709. See also *Gordon v. City of Warren* [1978] 579 F 2d 386.)

The ordinance takes First Church's property.

The Constitution does not permit Los Angeles County to regulate First Church's use of its property out of existence.

APPENDIX 2

B003702

**IN THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA**

**FIRST ENGLISH EVANGELICAL
LUTHERAN CHURCH OF GLENDALE**

a California corporation,

Plaintiff and Appellant,

vs.

**COUNTY OF LOS ANGELES,
CALIFORNIA and LOS ANGELES
COUNTY FLOOD CONTROL DISTRICT,**

Defendants and Respondents.

APPELLANT'S OPENING BRIEF

**Appeal From
Superior Court of Los Angeles County
Hon. Leon Savitch, Judge
Hon. J. Wesley Reed, Judge
Hon. Albert Matthews, Judge**

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**By: MICHAEL M. BERGER
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Appellant**

D

**The County's Prevention of Any Use
of the Lutherglen Property After the
Flood is Inverse Condemnation**

Because of the constitutional protection accorded private property rights, government agencies may not regulate property so restrictively that all viable use is prevented:

"While acknowledging the power of government to preserve and improve the quality of life for its citizens through the regulation of the use of private land, we cannot countenance the service of this legitimate need through the uncompensated destruction of private property rights. Such Fifth Amendment property rights have been equated by the constitutional draftsmen with the cherished personal protections against self-incrimination, double jeopardy, and the guarantee of due process of law. These rights are protected by the same amendment." (*Agins v. City of Tiburon* [1979] 24 C 3d 266, 273-274)

After the flood, the Board of Supervisors enacted Ordinance 11,855, prohibiting any construction on the Lutherglen property. (CT 11-12)

The trial court struck the allegations concerning Ordinance 11,855 on the theory that the California Supreme Court's decision in *Agins* prohibited an inverse condemnation action based on a regulation. (CT 52)

It is true that *Agins* said that. However, the 1979 *Agins* decision has been held incorrect and ought not control.

First. In *Agins*, the California Supreme Court plainly linked its interpretation of the California Constitution to the U.S. Supreme Court interpretation of the federal constitution. (See 24 C 3d at 273-275.)¹⁵ It was in that context that the Court concluded that an inverse condemnation remedy was not constitutionally required.¹⁶

Second. Federal law after *Agins* has shown that an inverse condemnation remedy is constitutionally compelled.

The place to start is with the U.S. Supreme Court's decision in *San Diego Gas & Elec. Co. v. City of San Diego* (1981) 450 US 621. Uniquely, *San Diego Gas* is important not for its lead opinion, but for the others. The lead opinion was signed by four Justices and concluded that the case was not "final" for purposes of U.S. Supreme Court review. It refused to deal with the merits. The dissent by Justice Brennan also garnered four signatures. The dissent discussed the merits. What elevates the dissent above the norm is the concurring opinion of the ninth Justice, Justice Rehnquist. He agreed with the lead opinion that the decision was not "final" enough to review. However, he said he would agree with the dissenters on the merits if the case had been procedurally appropriate for decision.¹⁷

¹⁵ Thus, the fact that the Amended Complaint alleged a violation of the California Constitution rather than the U.S. Constitution (CT 15) is irrelevant, as federal law determines both.

¹⁶ This was simply a continuation of a long-standing practice of the California Supreme Court to treat deprivations of property as questions of federal law. (See, e.g., *Brookes v. City of Oakland* [1911] 160 C 423, 427.)

¹⁷ Because of Justice Rehnquist's concurring opinion, other courts have generally acknowledged Justice Brennan's dissent as expressing the views of a majority of the U.S. Supreme Court on the substantive law discussed. (*Hernandez v. City of Lafayette* [5th Cir 1981] 643 F 2d 1188, 1199-1200; *Devines v. Maier* [7th Cir 1981] 665 F 2d 138,

Justice Brennan's dissent compared the California Supreme Court's decision in *Agins* to U.S. Supreme Court analyses and concluded:

"This holding flatly contradicts clear precedents of this Court." (450 US at 647)

"The only constitutional requirement is that the landowner must be able meaningfully to challenge a regulation that allegedly effects a taking, and recover just compensation if it does so." (450 US at 660)

Since *San Diego Gas*, the Ninth Circuit Court of Appeals has twice noted that the *Agins* conclusion is moribund.

In *In re Aircrash in Bali* (9th Cir 1982) 684 F 2d 1301, 1311, fn 7, the Court said:

"It has been suggested that one who contests the constitutionality of a law which deprives the claimant of some property interest may not 'sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid' [citing *Agins*]. This does

(ftn. continued)

152; *Barbian v. Panagis* [7th Cir 1982] 694 F 2d 476, 482, fn 5; *In re Aircrash in Bali* [9th Cir 1982] 684 F 2d 1301, 1311, fn 7; *Martino v. Santa Clara Valley Water Dist.* [9th Cir 1983] 703 F 2d 1141, 1148; *Fountain v. Metro Atlanta Rapid Transit Authority* [11th Cir. 1982] 678 F 2d 1038, 1043; *Burrows v. City of Keene* [NH 1981] 432 A 2d 15, 20; *Pratt v. State* [Minn 1981] 309 NW 2d 767, 774; *Rippley v. City of Lincoln* [ND 1983] 330 NW 2d 505, 510; *Zinn v. State* [Wis 1983] 334 NW 2d 67, 72; *Kinzli v. City of Santa Cruz* [ND Cal. 1982] 539 F Supp 887, 896; *Sheerr v. Township of Evesham* [NJ Super 1982] 445 A 2d 46)

not, however, appear to be the law. Four justices of the Supreme Court have stated that '[t]his holding flatly contradicts clear precedents of [the Supreme] Court' [citing the Brennan dissent in *San Diego Gas*]. At least one other Justice has expressed agreement with this view [citing the Rehnquist concurrence]. . . . Thus, we take it to be the view of the majority of the Supreme Court that '[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking' [citations]. Thus, notwithstanding the view of the California Supreme Court, we assume that the excessive exercise of the government's lawmaking powers may constitute a 'taking' under the Fifth Amendment for which just compensation must be paid [citations.]"

This conclusion was echoed the next year in *Martino v. Santa Clara Valley Water Dist.* (9th Cir 1983) 703 F 2d 1141, 1148:

"The present vitality of this aspect of *Agins* has, however, been substantially undercut by Justice Brennan's dissenting opinion in *San Diego Gas*

...

* * *

"[A] majority of the [U.S. Supreme] Court apparently is of the opinion — contrary to that of the California Supreme Court in *Agins* — that damages are recoverable for inverse condemnation."

Thus the federal underpinning of *Agins* has been cut from beneath the opinion. The body of federal law on which *Agins* was built has been held by its creators to require a contrary result.

Finally. While California may enforce its own Constitution in a manner which affords *more* protection to individuals than the U.S. Constitution, it may not afford *less*. See, e.g., *Pruneyard Shopping Center v. Robins* [1980] 447 US 74, 81, and cases there cited.)

It is thus appropriate to reexamine the effect of the County's Ordinance 11,855 in light of the federal law developed after *Agins*.

dissenting on behalf of four Justices]; see 450 US at 633-634 [Rehnquist, J., concurring, but noting agreement with the substance of Justice Brennan's dissent.]) Five U.S. Courts of Appeals (including the Ninth Circuit in two different cases) have agreed with Justice Brennan's analysis. Virtually all state courts to consider the matter since then have also agreed with Justice Brennan. All believe compensation is Constitutionally compelled.

It would seem appropriate for this Court to re-examine its views in light of these more recent developments. While efforts to obtain a definitive determination of the validity of the California rule from the U.S. Supreme Court have thus far failed for procedural reasons,² it seems only a matter of time. As one commentator put it:

"When the best, most liberal Justice of the Burger Court's *San Diego* panel, joined on the substantive issue by the Court's most conservative member, derides the California Supreme Court for its parochial, muddled views on takings, inverse condemnation and the Constitution, more is at work than a mere dissertation on private property rights." (Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls* [1983] 15 Rutgers L.J. 15, 94-95)

The proper course would seem to be for this Court to re-evaluate its conclusions on its own. This case presents the opportunity.

Finally. This case may be distinguishable from the type of regulation envisioned in *Agins*. There, vacant land was

² In *Agins*, the issue was not ripe; in *San Diego Gas*, the decision was not final.

involved. Here, by contrast, development was originally permitted. Then, after a disaster, restoration was forbidden. On these facts, the reasonable, investment-backed expectation of continued ability to use the property was thwarted. Even if the general *Agins* rule remains unchanged, there may be room for a modification in this situation.

* * *

**IT IS TIME FOR THIS COURT TO
RECONSIDER ITS HOLDING
THAT REGULATORY ACTIONS
OF GOVERNMENT AGENCIES
CAN NEVER GIVE RISE TO AN
ACTION FOR DAMAGES IN IN-
VERSE CONDEMNATION. THE
HOLDING CONFLICTS WITH
FEDERAL DECISIONS**

Because of the Constitutional protection accorded private property rights, government agencies may not regulate property so restrictively that all viable use is prevented:

"While acknowledging the power of government to preserve and improve the quality of life for its citizens through the regulation of the use of private land, we cannot countenance the service of this legitimate need through the uncompensated destruction of private property rights. Such Fifth Amendment property rights have been equated by the constitutional draftsmen with the cherished personal protections

against self-incrimination, double jeopardy, and the guarantee of due process of law. These rights are protected by the same amendment." (*Agins v. City of Tiburon* [1979] 24 C 3d 266, 273-274)

After the flood, the Board of Supervisors enacted Ordinance 11,855, prohibiting any construction on the Lutherglen property. This ordinance prohibits all use, even restoration of the flood-destroyed buildings. (CT 11-12)

The trial court struck the cause of action seeking damages caused by this regulatory stultification on the theory that this Court's decision in *Agins* prohibited an inverse condemnation action based on regulation. (CT 52) The Court of Appeal affirmed.

It is true that *Agins* said that. However, since its decision in 1979, much doubt has been cast on this Court's *Agins* decision.

Reexamination seems in order.

First. In *Agins*, this Court plainly linked its interpretation of the California Constitution to the U.S. Supreme Court's interpretation of the Federal Constitution. (See 24 C 3d at 273-275.) It was in that context that this Court concluded that an inverse condemnation remedy was not Constitutionally required.¹³

Second. Federal law after *Agins* has shown that an inverse condemnation remedy is Constitutionally compelled.

The place to start analysis is with the U.S. Supreme Court's decision in *San Diego Gas & Elec. Co. v. City of San Diego* (1981) 450 U.S. 621. Uniquely, *San Diego Gas* is important not for its lead opinion, but for the others. The lead opinion was signed by four Justices and

¹³ This was simply a continuation of a long-standing practice of this Court to treat deprivations of property as questions of Federal law. (See, e.g., *Brookes v. City of Oakland* [1911] 160 C 423, 427.

concluded that the case was not "final" for purposes of U.S. Supreme Court review. It refused to deal with the merits. The dissent by Justice Brennan also garnered four signatures. The dissent discussed the merits. What elevates the dissent above the norm is the concurring opinion of the ninth Justice, Justice Rehnquist. He agreed with the lead opinion that the decision was not "final" enough to review. However, he said he would agree with the dissenters on the merits if the case had been procedurally appropriate for decision

Because of Justice Rehnquist's concurring opinion, other courts have generally acknowledged Justice Brennan's dissent as expressing the views of a majority of the U.S. Supreme Court on the substantive law discussed.¹⁴

Justice Brennan's dissent compared this Court's decision in *Agins* to U.S. Supreme Court analyses and concluded:

"This holding flatly contradicts clear precedents of this Court." (450 US at 647)

"The only constitutional requirement is that the landowner must be able meaningfully to challenge a regulation that allegedly effects a taking,

¹⁴ (*Hernandez v. City of Lafayette* [5th Cir 1981] 643 F 2d 1188, 1199-1200; *Hamilton Bank v. Williamson County Reg. Plan. Comm.* (6th Cir 1984) 729 F 2d 402 408, rev'd on other grounds (1985) __US__; *Devines v. Maier* [7th Cir 1981] 665 F 2d 138, 152; *Barbian v. Panagis* [7th Cir 1982] 694 F 2d 476, 482, fn 5; *In re Aircrash in Bali* [9th Cir 1982] 684 F 2d 1301, 1311, fn 7; *Martino v. Santa Clara Valley Water Dist.* [9th Cir 1983] 703 F 2d 1141, 1148; *Fountain v. Metro Atlanta Rapid Transit Authority* [11th Cir. 1982] 678 F 2d 1038, 1043; *Burrows v. City of Keene* [NH 1981] 432 A 2d 15, 20; *Pratt v. State* [Minn 1981] 309 NW 2d 767, 774; *Rippley v. City of Lincoln* [ND 1983] 330 NW 2d 505, 510; *Zinn v. State* [Wis 1983] 334 NW 2d 67, 72; *Annicelli v. South Kingstown* (RI 1983) 463 A 2d 133, 140; *Kinzli v. City of Santa Cruz* [ND Cal. 1982] 539 F Supp 887, 896; *Sheerr v. Township of Evesham* [NJ Super 1982] 445 A 2d 46)

and *recover just compensation* if it does so.”
(450 US at 660; emphasis added.)

Since *San Diego Gas*, the Ninth Circuit Court of Appeals has twice noted that the *Agins* conclusion appears moribund.

In *In re Aircrash in Bali* (9th Cir 1982) 684 F2d 1301, 1311, fn 7, the Court said:

“It has been suggested that one who contests the constitutionality of a law which deprives the claimant of some property interest may not ‘sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid’ [citing *Agins*]. This does not, however, appear to be the law. Four justices of the Supreme Court have stated that ‘[t]his holding flatly contradicts clear precedents of [the Supreme] Court’ [citing the Brennan dissent in *San Diego Gas*]. At least one other Justice has expressed agreement with this view [citing the Rehnquist concurrence]. . . . Thus, notwithstanding the view of the California Supreme Court, we assume that the excessive exercise of the government’s lawmaking powers may constitute a ‘taking’ under the Fifth Amendment for which just compensation must be paid. [Citations.]”
(Emphasis added.)

This conclusion was echoed the next year in *Martino v. Santa Clara Valley Water Dist.* (9th Cir 1983) 703 F 2d 1141, 1148:

“The present vitality of this aspect of *Agins* has, however, been substantially undercut by Justice Brennan’s dissenting opinion in *San Diego Gas* . . .

* * *

“[A] majority of the [U.S. Supreme] Court apparently is of the opinion — *contrary to that of the California Supreme Court in Agins* — that damages are recoverable for inverse condemnation.” (Emphasis added.)

Thus the Federal underpinning of *Agins* has been cut from beneath the opinion. The body of Federal law on which *Agins* was built has been held by its creators to require a contrary result.

Finally. While California may enforce its own Constitution in a manner which affords *more* protection to individuals than the U.S. Constitution, it may not afford *less*. (See, e.g., *Pruneyard Shopping Center v. Robins* [1980] 447 US 74, 81; *Mills v. Rogers* [1982] 457 US 291, 300.)

It thus seems appropriate for this Court to reexamine its *Agins* conclusion in light of the Federal law developed after *Agins*.

APPENDIX 5

LOS ANGELES COUNTY ORDINANCES

22.44.040 Establishment, expansion or repeal — Petition requirements. Any person who is the owner of the property involved, or has written permission of an owner of all or a portion of the property involved, may file a petition for establishment, expansion or repeal of a supplemental district with the director, except that a person may not file and the director shall not accept a petition which is the same as, or substantially the same as, a petition upon which final action has been taken, either by the commission or by the board of supervisors within one year prior thereto. (Ord. 1494 Ch. 9 Art. 1 § 901.3, 1927.)

22.56.260 Purpose — Conditions for granting variances. The variance procedure is established to permit modification of development standards as they apply to particular uses when practical difficulties, unnecessary hardships or results inconsistent with the general purposes of this Title 22, develop through the strict literal interpretation and enforcement of such provisions. A variance may be granted to permit modification of:

- A. Building line setbacks, yards, open space and buffer areas;
- B. Height, lot coverage, density and bulk regulations;
- C. Off-street parking spaces, maneuvering areas and driveway width, and paving standards;
- D. Landscaping requirements;

- E. Wall, fencing and screening requirements;
- F. Street and highway dedication and improvement standards;
- G. Lot area and width requirements;
- H. Operating conditions such as hours or days of operations, number of employees, and equipment limitations;
- I. Sign regulations other than outdoor advertising. (Ord. 1494 Ch. 5 Art. 2 § 502.1, 1927.)

REPLY BRIEF

20

Supreme Court, U.S.
FILED

JAN 5 1987

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CLERK

No. 85-1199

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

FIRST ENGLISH EVANGELICAL LUTHERAN
CHURCH OF GLENDALE, a California corporation,
Appellant,

vs.

COUNTY OF LOS ANGELES, CALIFORNIA,
Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SEVEN

APPELLANT'S REPLY BRIEF

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APPENDIX 1

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT NOTE FROM JOHN L. WALLACE, PROGRAM MANAGEMENT DIVISION, DATED OCTOBER 3, 1978

APPENDIX 2

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT MEMORANDUM FROM C. J. WILT, PROJECT PLANNING DIVISION, DATED MAY 22, 1978

APPENDIX 3

FACTUAL REPORT AND NEGATIVE DECLARATION ATTACHED FOR FLOOD PROTECTION DISTRICT CASE NO. 3-(5), PREPARED BY NORMAN B. NELSON, ZONE CHANGE SECTION DEPARTMENT OF REGIONAL PLANNING, HEARING. DATE: OCTOBER 1, 1980

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1. INTRODUCTION

A. No One Denies The Importance Of The Compensation Issue

The Nation needs an answer to the compensation issue, and it needs it now.

Nothing in the 180 pages of briefs filed by the County and its various organizational *Amici Curiae* has done anything to detract from this Court's conclusion of "... the importance of the question whether a monetary remedy in inverse condemnation is Constitutionally required in appropriate cases involving regulatory takings ..." (*MacDonald, Sommer & Frates v. County of Yolo* [1986] 477 US __, 91 L Ed 285, 294)

The court whose decision is here for review understands the urgency. Its statement could not have been more clear:

"We conclude that *because the United States Supreme Court has not yet ruled on the question of whether a state may constitutionally limit the remedy for a taking to nonmonetary relief, this Court is obligated to follow Agins[I].*" (JS App A, p A16; emphasis added.¹)

B. There Is Substantial Agreement By The Parties On The Basic Issues

Notwithstanding some of the erroneous analysis in the County's brief, there is important agreement between the County and First Church on central issues.

— Item: The County's brief urges forcefully that:

"A police power regulation of property results in an unconstitutional taking only if, after an *'ad hoc*

¹ As in the other briefs, the decision of the California Supreme Court in *Agins v. City of Tiburon* (1979) 24 Cal 3d 266 will be referred to as *Agins I*, and this Court's decision in *Agins v. City of Tiburon* (1980) 447 US 255 will be referred to as *Agins II*.

factual inquiry,' it is determined that the individual property owner has been forced to bear an economic burden which, in 'fairness and justice,' should be borne by the public as a whole." (County p 29)

The County is right. Yet, the one thing that is clear about the proceedings in this case to date is that First Church has had *no chance* to have an "*ad hoc* factual inquiry" into the burden cast upon it by the County's ordinance.

— Item: The County concedes the principal legal issue in this case:

"Appellant [First Church] argues at length that decisions of this Court and public policy mandate just compensation as the remedy for a taking. [Citation.] That principle of Constitutional jurisprudence, however, has never been in doubt. . . . [T]he Fifth Amendment, on its face, prohibits a taking of private property for a public use without just compensation.

* * *

"Neither *Agins I* nor the County herein disputes the *ultimate* requirement of compensation mandated by the Fifth Amendment." (County pp 38-39; emphasis, the County's.)

But that (as the accountants are wont to say) is the "bottom line" of this case. Notwithstanding the County's tortured interpretation of *Agins I*, discussed later in this brief, the California courts simply refuse to acknowledge the availability of just compensation as a remedy for a regulation whose effect has *already been to take private property for public use*. For First Church to have an appropriate "*ad hoc* factual inquiry" into the effect of the County's ordinance and, on proving its case, to receive the relief required by the Constitution, a clear holding from this Court that California's rule prohibiting compensation as a remedy is sorely needed.

Thus, disregarding the sound and the fury of the various pro-County briefs,² whose authors desperately attempt to argue factual issues in a case which has never had a factual trial, it is now possible for this Court to answer the compensation question which has troubled it during this decade, as there is substantial agreement between the parties as to what the law is. What is needed is for this Court to plainly apply that law in a majority opinion in a land use case.

C. The Facts In This Case Are Not Subject To Dispute At This Time Or In This Forum

In an effort to bolster its case, the County has produced for this Court selected portions of the background data underlying the adoption of its ordinance.³ The County's selective presentation of documents from its own files demonstrates the wisdom of this Court's reluctance (a reluctance shared generally by all reviewing courts) to delve into factual disputes which have not been fully exposed to the rigors of trial. (See *California Transport. v. Trucking Unlimited*

² The County and a number of its *Amici* rely repeatedly on a recent, polemical, law review article as authority for various arguments. The article is Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto* (1984) 9 Vt. L. Rev. 193. At the end of this 53 page article, it is conceded to be "... a brief opposing the theory that regulation which 'goes too far' constitutionally requires compensation." (9 Vt. L. Rev. at 245; emphasis added.)

As a conceded "brief" by partisans, it is entitled to no more weight than any other brief, particularly in light of its unwarranted attack on Justice Brennan's analysis of the just compensation clause.

Space limitations prohibit a detailed analysis of the *Manifesto* here. However, the author of this brief co-authored a response which does so. See Berger & Kanner, *Thoughts on The White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation For Regulatory Taking of Property* (1986) 19 Loy. L. A. L. Rev. 685.

³ Its *Amici* have likewise discussed the "facts" without any pretense of record support.

[1972] 404 US 508, 515.)⁴ For example, the County quotes its own self-serving report which concludes that "... all affected parcels *still will have buildable areas* ..." (County p 13; emphasis, the County's.)⁵

Further County memoranda demonstrate the County's belief that construction in the area will generally be prohibited⁶ and acknowledge the County's plan for making Luther Glen part of a County flood control channel:

"One strategy in Los Angeles County's comprehensive program to ensure compliance with the requirements of the Federal Flood Program is the designation of flood protection areas along designated stream beds in the unincorporated County area. *This is accomplished by prohibition of buildings and major structures within an area reserved for flood flows* ..." (App. 3 hereto; emphasis added.)

The purpose of presenting additional material from the County's files is not to argue the merits of First Church's case, but to show the futility of the course of action which the County and its *Amici* are attempting to foist upon this Court, *i.e.*, to have this Court try to reach a factual conclusion about either the wisdom of the County's action or its impact on First Church. As this Court knows, it is not equipped to make such decisions. (*Compare Jenkins v. McKeithen* [1969] 396 US 411, 432.) That is why trial courts were created.⁷

⁴ The County's presentation overlooks numerous other pertinent documents in the same County files. First Church requests this Court to take judicial notice of portions of three of them. (See Appendices 1-3 hereto.)

⁵ First Church has disagreed with this assertion from the outset. (App. 1 hereto)

⁶ App. 2 hereto.

⁷ Much of the briefing of the County and its *Amici* is addressed to the question of whether First Church properly exhausted its administrative

(continued)

If its case is so good, the County should welcome the opportunity to prove it. However, the procedure it voluntarily chose — to strike the allegations from the complaint — cannot convert this Court into a trier of fact.⁸ (*See Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.* [1965] 382 US 172, 178.)

(ftn. continued)

remedies, thus raising the question of whether this case might be discarded like previous cases as being "unripe."

The issue is not available *here*, because the County consciously chose to raise *no part* of this factual defense below. It accepted the facts and argued *only* the remedy issue, thus waiving *arguendo* the sufficiency of the facts. (*Cf. Weinberger v. Salfi* [1975] 422 US 749, 767.)

An analysis of the County's theories about seeking repeal of the ordinance or a variance therefrom appears in First Church's Opposition to Appellee's Second Motion to Dismiss pp 5-6, n. 7.

Suffice it to note here: *First*. First Church did protest the adoption of the ordinance and told the County of its dire economic consequences. (App. 1 hereto) *Second*. To seek *repeal* of an ordinance which had just been adopted after three years of study goes beyond futility to absurdity. *Third*. No variance could be granted which is not in harmony with the ordinance. (*E.g., Cow Hollow Imp. Club v. DiBene* [1966] 245 Cal App 2d 160.) As noted above, the intent of this ordinance was to create "... an area reserved for flood flows ..." which was to be accomplished "... by prohibition of buildings and major structures ..." (App. 3 hereto) Thus, no variance could undo the basic thrust of the ordinance.

⁸ The County seeks to make an issue of the fact that it *moved to strike* the allegations as irrelevant, rather than *demurring* to them and admitting their factual accuracy. (County pp 23-24) Overlooked by the County is that it *also* filed a demurrer in almost identical terms (and certainly on identical grounds):

"Allegations regarding the January 11, 1979 ordinance of the County (Complaint, pages 8 and 9) fails to state a cause of action for inverse condemnation liability. The Supreme Court has recently declared that the sole remedy available to a property owner complaining of limited use by ordinance or zoning is through declaratory relief or mandamus, and not inverse condemnation. *Agins v. City of Tiburon* (1979) 24 Cal.3d 266." (County Demurrer, [Oct. 2, 1979] pp 9-10)

However the County wants to view it, it made *no* attack on the factual sufficiency of the complaint below. It accepted the facts as pled.

2. THE COMPENSATION ISSUE IS RIPE FOR DETERMINATION

A. There Is A Taking

As the discussion above shows, a taking has been alleged. The complaint shows that the County's ordinance has rendered the subject property worthless. It has been converted by the County into part of its system of flood control channels. That is a taking for a public use.

B. This Court Has Plainly And Repeatedly Held That Just Compensation — Rather Than Invalidation — Is The Appropriate Remedy For A Taking Within The Meaning Of The Fifth Amendment

The one thing that this Court's recent opinions — both land use and otherwise — have made clear is that payment of compensation is the primary remedy under the just compensation clause.

One need look no further than one of the recent series of land use decisions of this Court, *Williamson County Regional Planning Commission v. Hamilton Bank* (1985) 473 US ___, 87 L Ed 2d 126, 144:

"... a property owner has not suffered a violation of the Just Compensation Clause *until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation...*" (Emphasis added.)⁹

The same precept appears in *Dames & Moore v. Regan* (1981) 453 US 654. While holding that the *validity of the legislation was not yet ripe* for adjudication, this Court felt quite differently about the *ripeness of the question of availability of compensation* for property which *may have*

⁹ Of course, California — through the decisions in *Agins I* and its progeny — prohibits the recovery of compensation for a regulatory taking.

been taken by the legislative and executive actions which settled the Iranian hostage crisis:

"However, this contention, and the possibility that the President's actions *may* effect a taking of petitioner's property, *make ripe for adjudication the question of whether petitioner will have a remedy at law* in the Court of Claims under the Tucker Act [Citation], in such an event. *That the fact and extent of the taking in this case is yet speculative, is inconsequential* because 'there must be at the time of taking "reasonable, certain and adequate provision for obtaining compensation".' [Citations.]" (453 US at 689; emphasis added.)¹⁰

Thus, regardless of the factual posture of this case, *the compensation issue* is the one issue which is plainly *ripe* for adjudication. To focus, as the County does, on the utility of its ordinance, is beside the point. As this Court has said, the validity of the legislation and the need for compensation are "... entirely separate question[s]." (*Kaiser Aetna v. U.S.* [1979] 444 US 164, 174)

C. The Fifth Amendment Is Self-Executing

The Solicitor General devotes much of what is an otherwise admirable brief¹¹ to the argument that the Fifth Amendment is not self-executing.

While lengthy and intricate, the argument of the Solicitor General is not sufficient to gainsay the common sense notion that, when the Fifth Amendment said that property shall not be taken for public use without just compensation, it plainly meant that, *when property has in fact been taken,*

¹⁰ The same sort of analysis appears in *Ruckleshaus v. Monsanto Co.* (1984) 467 US 986 and the *Regional Rail Reorganization Act Cases* (1974) 419 US 102, 126.

¹¹ See, e.g., Solicitor General pp 10-11, concluding that regulations *can* effect takings within the meaning of the Fifth Amendment, either permanently or temporarily.

compensation is due.

i. **The Fifth Amendment Has Been Consistently Enforced As Requiring Compensation**

The point was succinctly made by this Court in *Jacobs v. U.S.* (1933) 290 US 13, 16:

"The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. *That right was guaranteed by the Constitution.* The fact that condemnation proceedings were not instituted and the right was asserted in suits by the Owners did not change the essential nature of the claim. *The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment.*" (Emphasis added.)

Notwithstanding such clear language, as well as the recognition by this Court more recently in *U.S. v. Clarke* (1980) 445 US 253, 257, which referred to the "self-executing character of the Constitutional provision with respect to compensation," the Solicitor General urges that, in each of the cases in which this Court has acknowledged the right to compensation under the Fifth Amendment, this Court's holding was supposedly made because of the Tucker Act, which provides for a remedy in the Claims Court.

This argument is not new. It was made by the United States and rejected by this Court four decades ago. The argument has not improved with age. As this Court put it in *U.S. v. Dickinson* (1947) 331 US 745, 748:

"But whether the theory . . . be that there was a taking under the Fifth Amendment, and that therefore *the Tucker Act* be invoked because it is a claim founded upon the Constitution, or that there was an implied promise by the Government to pay for it, is immaterial. In either event, *the claim traces back to the prohibition of the Fifth Amendment, 'nor shall private property be taken for public use, without just compensation.'* The Constitution is 'intended to preserve practical and substantial rights, not to maintain theories.'"

It is hard to improve on this Court's conclusion in *Dickinson*. The intricate arguments presented by the Solicitor General, in an effort to demonstrate that the Fifth Amendment is not self-executing, remind one of intellectual games. They ignore the reality of what is happening to real people in the real world.

In interpreting the Constitution, this Court has never felt itself particularly bound by intricate rules. Indeed, in *Davis v. Passman* (1979) 442 US 228, this Court contrasted the simple majesty of the Constitution with the complexity of statutorily created rights.¹²

It is time to end the confusion. This Court has plainly and repeatedly said that the Fifth Amendment and particularly its just compensation component are self-executing.¹³ An

¹² "The Constitution, on the other hand, does not 'partake of the prolixity of a legal code.' *McCulloch v. Maryland*, 4 Wheat 316, 407 (1819). It speaks instead with a majestic simplicity. One of 'its important objects,' *ibid.*, is the designation of rights. And in 'its great outlines,' *ibid.*, *the judiciary is clearly discernible as the primary means through which these rights may be enforced.*" (442 US at 241-42; emphasis added)

¹³ Interestingly, while the Solicitor General argues strenuously that the Fifth Amendment's just compensation provision is not self-executing and claims to be unable to locate *any* case in which a damage remedy has been invoked for *any* of the clauses of the Fifth Amendment (Solicitor General p 15), *Davis v. Passman* is one such case:

explicit restatement to that effect in the context of a municipal land use regulation would go far toward restoring justice to the citizens of the United States in general, and California in particular.

**ii. The Civil Rights Act Is An Alternative —
Not a Substitute — For Action Directly
Under the Constitution**

The Solicitor General urges that, because Congress has enacted 42 USC §1983, there is neither need nor authority for an action directly under the Fourteenth Amendment. The Solicitor General thereby errs.

First. With respect to the rights actually guaranteed by the words of the Fourteenth Amendment, this Court long ago said that the Amendment was "self-executing". (*Civil Rights Cases* [1883] 109 US 3, 20)

The Solicitor General's concentration on Section 5 of the Fourteenth Amendment, which authorizes Congress to adopt appropriate legislation to enforce the Amendment, thus seems inapt.¹⁴ Were it otherwise, one would be left with the ludicrous proposition that the framers of the Fourteenth Amendment intended the substantive terms of that Amendment to be hortatory statements which Congress could enliven or repeal.

Second. This Court has three times in recent years implied damages remedies for violations of various elements of the

(ftn. continued)

"We hold today that . . . petitioner has a cause of action under the Fifth Amendment and . . . her injury may be redressed by a damages remedy." (442 US at 248-249)

¹⁴ The clear meaning of the Fourteenth Amendment must be, as this Court implied in the *Civil Rights Cases*, that the substantive provisions of the Fourteenth Amendment mean exactly what they say and are intended to be enforced without further action by Congress. Section 5 of the Fourteenth Amendment merely gives Congress the right to go beyond the bare words of the Fourteenth Amendment and deal with particular issues as they arise.

Bill of Rights. (*Bivens v. Six Unknown Federal Narcotics Agents* [1971] 403 US 388 [4th Amend.]; *Davis v. Passman* [1979] 442 US 228 [5th Amend.]; *Carlson v. Green* [1980] 446 US 14 [8th Amend.])

These cases clearly provide an answer to the Solicitor General. The key case is *Carlson*. There, an alternative remedy was provided by Congress: the Federal Tort Claims Act. Thus, the question presented to this Court was whether it ought to permit an action directly under the Eighth Amendment or to hold that the existence of the Federal Tort Claims Act precluded implication of an action directly under the Constitution. This Court held that, unless it is clearly shown that Congress intended its remedy to be the exclusive remedy, there is no bar to implying a remedy directly under the Constitution. (446 US at 18-19)

There would be little point in going into an exhaustive examination of the legislative history of 42 USC §1983, as this Court did that in *Monell v. New York City Department of Social Services* (1978) 436 US 658, 665-695. Suffice it to note that nothing in that discussion indicates any intention on the part of Congress to forbid the availability of a remedy directly under the Constitution to citizens who are injured by violations of the Fourteenth Amendment.¹⁵

The treatment given this issue by this Court in *Bivens*, *Davis*, and *Carlson* is quite similar to this Court's analysis of the Constitutionality of legislation in *Ruckelshaus v. Monsanto Co.* (1984) 467 US 986, 1017; *Regional Rail Reorganization Act Cases* (1974) 419 US 102, 126; and

¹⁵ See, for example, the arguments of Representative Shellabarger, reported at 436 US at 670-71. He there noted that, historically, the courts had enforced general prohibitions upon actions of government agencies. Likewise, see this Court's discussion at 436 US at 680-81, in which the Court acknowledged the judicial power to act against municipalities which directly violated the terms of the Fourteenth Amendment.

Dames & Moore v. Regan (1981) 453 US 654, 689-90.¹⁶ This Court's consistent conclusion was that, *unless Congress expressly withdrew* Tucker Act jurisdiction, then this Court would assume that the remedy existed. That rendered each piece of legislation Constitutional, as it provided a compensatory remedy.

Thus, the analyses of this Court in the *Bivens* line and the *Ruckelshaus* line coalesce: Unless Congress has taken direct action to *preclude* direct compensatory litigation, it is presumed that Congress intended to *permit* it.

D. *Agins I* Through The Looking Glass: Has Everyone Misunderstood It?

To anyone who has familiarized himself with the law dealing with regulatory takings since 1979, the section of the County's Brief beginning on page 38 must assuredly boggle the mind. It is as though one had stepped through some sort of science fiction time warp into another dimension. In that section, the County urges: "AGINS I DOES NOT BAR JUST COMPENSATION AS A REMEDY FOR A TAKING . . ." (County p 38)

That statement would surely come as a surprise not only to the California Supreme Court, but to all other California courts which have dealt with the issue, as well as all litigants who have litigated the issue in California.¹⁷

¹⁶ In each of those cases, the question this Court had to decide was whether legislation which potentially took property from private citizens for public use was Constitutional. That answer depended on whether there was a provision for compensation after the taking of property. The place to recover compensation in each of the those cases, as they were against federal officers, would be the Claims Court. This Court's analysis in each case therefore dwelt on whether Congress intended the Tucker Act to be available as a remedy in case of a taking.

¹⁷ That *Agins I* does bar just compensation as a remedy for a regulatory taking in California is born out by each of the following cases: *Baker v. Burbank-Glendale-Pasadena Airport Authority* (1985) 39 Cal 3d 862,

(continued)

With all the respect due it, the County's argument is fantasy. *Agins I* is what it is. No sophistic alchemy can turn that Constitutional sow's ear into a silk purse. *Agins I* plainly forbids compensation for a regulatory taking and, by so doing, violates the Fifth Amendment.

Contrary to the County's fantasy, California does not permit compensation after an ordinance is invalidated. (*HFH v. Superior Court* [1975] 15 Cal 3d 508, 518)

3. THE ARGUMENTS AGAINST COMPENSATION ARE NOT SUBSTANTIAL

A. The County's Virtuous Purpose Cannot Override The Fifth Amendment

The arguments made by the County and by each of its *Amici* (except the Solicitor General) are premised on the concept that what the County is doing is right and proper, *i.e.*, engaging in a program which will prevent or reduce the danger of flooding. From that premise, the County and its *Amici* leap to the conclusion that, regardless of the impact of the County's ordinance on First Church's property, the County cannot be required to pay just compensation.

The County and its *Amici* are wrong. As this Court said in *Kaiser Aetna*, 444 US at 174, the wisdom or legitimacy of

(ftn. continued)

867, n. 4; *Furey v. City of Sacramento* (1979) 24 Cal 3d 862, 871; *Palmer v. City of Ojai* (1986) 178 Cal App 3d 280, 294-95; *Walter H. Leimert Co. v. California Coastal Commission* (1983) 149 Cal App 3d 222, 234; *Aptos Seascapes Corp. v. County of Santa Cruz* (1982) 138 Cal App 3d 484 492-94; *Taper v. City of Long Beach* (1982) 129 Cal App 3d 590, 611; *Gilliland v. County of Los Angeles* (1981) 126 Cal App 3d 610, 615-16; *Gilliland v. City of Palmdale* (1981) 179 Cal Rptr 627, 631; *Liberty v. California Coastal Commission* (1980) 113 Cal App 491, 498; *Rancho La Costa v. County of San Diego* (1980) 111 Cal App 3d 54, 65; *Toso v. City of Santa Barbara* (1980) 101 Cal App 3d 934, 948; *Briggs v. State* (1979) 98 Cal App 3d 190, 202; *Viso v. State* (1979) 92 Cal App 3d 15, 21, n 2.

the goal and the need for compensation are "... entirely separate question[s]."

This Court has plainly expressed its antipathy to the notion that noble regulatory goals could override Constitutional guarantees:

"Mass transportation, energy conservation, and environmental protection are goals that are important and of legitimate public concern. Appellees contend that these goals are so important that any harm to bondholders from repeal of the 1962 covenant is greatly outweighed by the public benefit. We do not accept this invitation to engage in a utilitarian comparison of public benefit and private loss.... Thus, a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors." (*United States Trust Co. v. New Jersey* [1977] 431 US 1, 29-30)¹⁸

The upshot of the governmental position at bench would be the elimination of the just compensation clause. In a comprehensive treatment of the issue, this Court defined a regulatory taking in terms of three factors — diminution of the property's economic value, interference with distinct investment-backed expectations, and the character of the government's action in the sense of whether there has been

¹⁸ The same result was reached by the Supreme Judicial Court of Massachusetts, in a case in which the so-called "environmental interests" urged that regulators be freed from Constitutional constraints. The effort failed:

"In this conflict between the ecological and the constitutional, it is plain that neither is to be consumed by the other. It is the duty of the Department of Conservation to look after the interests of the former, and it is the duty of the courts to stand guard over constitutional rights." (*Commissioner of Natural Resources v. S. Volpe & Co., Inc.* (Mass 1964) 206 NE 2d 666, 671)

a physical invasion of the property.¹⁹ (*Penn Central Transp. Co. v. City of New York* [1978] 438 US 104, 124; see *Kaiser Aetna*, 444 US at 175.) All three of these factors relate only to the impact of the governmental regulation on the individual's property interest. (See *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency* [9th Cir 1977] 561 F 2d 1327, 1332 [state must pay for taking even if exercising legitimate police power].) Indeed, as this Court said in *Boston Chamber of Commerce v. Boston* (1910) 217 US 189, 195, "... the question is, What has the owner lost?, not What has the taker gained?"

When inquiring whether a governmental regulation violates the just compensation clause of the Fifth Amendment, the question is not the subject matter of the governmental regulation but the impact on the private property owner. (See, e.g., *Kaiser Aetna*, 444 US at 174; cases collected in *San Diego Gas*, 450 US at 651-53 [Brennan, J., dissenting].)

A recent case from Rhode Island is instructive. In *Annicelli v. Town of South Kingstown* (RI 1983) 463 A 2d 133, the Town had zoned the property owners' land as being in a "High Flood Danger District." Nothing in the opinion of the Rhode Island Supreme Court disagreed with the factual conclusions of the town of South Kingstown. Nonetheless, placing the subject property in a high flood danger zone, which precluded development, required compensation. Indeed, the trial court had done what the governmental agencies in this case urge: the trial court had *invalidated* the ordinance as a taking without compensation. The Rhode Island Supreme Court concluded that invalidation was not the appropriate remedy, compensation was.

¹⁹ That the character of the government's action refers to whether the state is physically invading the individual's property has been twice noted by this Court. (See *Loretto v. Teleprompter Manhattan CATV Corp.* [1982] 458 US 419; *Connolly v. Pension Benefit Guaranty Corp.* [1986] ___ US ___, 89 L Ed 2d 166, 179.)

Thus, the arguments strung together by the County and its *Amici*, relating to the necessity of ordinances for flood protection, are no more than a large barrel of red herring. They are an attempt to divert the attention of this Court from the true subject matter of this proceeding: the remedy available because of impact of the County's ordinance on First Church's property. *That* is the question presented by the complaint, and *that* is the question that deserves a response from this Court.

B. Cases Authorizing Uncompensated Destruction of Property Which Itself Creates Harm Are Not Applicable

The County and its *Amici* have placed reliance on a narrow line of cases in which this Court has said that the destruction of private property does *not* constitute a compensable taking.

These cases are inapposite.

The cases involve nuisance-like uses of property which are injurious to others. This group includes the classic cases of *Mugler v. Kansas* (1887) 123 US 623 [prohibition of liquor business]; *Hadacheck v. Sebastian* (1915) 239 US 394 [prohibition of brick manufacture in a residential area]; *Reinman v. Little Rock* (1915) 237 US 171 [prohibition of livery stable in downtown area]; and *Goldblatt v. Hempstead* (1962) 369 US 590 [prohibition of excavation below water table].

The ordinances in these cases were upheld because the uses being made on the property in question were injurious to others.²⁰

²⁰ "The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not — and, consistently with the existence and safety of organized society, cannot be — burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, *by reason of their not being permitted by a*

(continued)

That is not so at bench. All that has happened here is that the County has decided that the most appropriate use of Lutherglen is as a *de facto* part of a flood control channel.²¹ (See App. 3 hereto.) The way chosen to achieve that was an ordinance forbidding all construction or use of buildings and structures. As neither construction nor use, by itself, is harmful to others, the prohibition cannot be made without compensation.

That the *Mugler* line of cases does not apply here is clear from another case decided in the *Mugler/Hadacheck* era, *Curtin v. Benson* (1911) 222 US 78. There, the Court held that the United States had taken private property within the meaning of the Fifth Amendment when it prohibited the owner of private property within the boundaries of Yosemite National Park from grazing cattle on his own property.²²

Thus, when the use being prevented is not one which is injurious to others, the *Mugler* line of cases supplies no

(ftn. continued)

noxious use of their property, to inflict injury upon the community." (*Mugler*, 123 US at 668, 669; emphasis added; quoted with approval in *Goldblatt*, 369 US at 593)

²¹ Thus, in a significant way, the case resembles an attempt to compel use of the property as part of a public project, something which historically has required compensation.

²² "His (Benson's) order is not, it will be observed, a regulation of the use of the land, as an order to fence the lands might be, but is an absolute prohibition of use. It is not a prevention of a misuse or illegal use, but the prevention of a legal and essential use, — an attribute of its ownership, — one which goes to make up its essence and value. To take it away is practically to take his property away; and to do what is beyond the power even of sovereignty, except by proper proceedings to that end." (*Curtin*, 222 US at 86; emphasis added.)

(See also *Penn Central*, 438 US at 145 [Rehnquist, J., dissenting, joined by Burger, C. J., and Stevens, J.])

authority to confiscate without compensation.²³

On a fundamental procedural level, this argument was never presented below. The Court of Appeal did *not* conclude that Lutherglenn was dangerous to anyone. As this Court bound itself in *MacDonald* to the procedural conclusions of the California Court of Appeal (91 L Ed 2d at 296), that same precept should hold true here. The *only* reason given by the Court of Appeal for its decision on this issue was the absence of guidance from this Court.

C. "After All, If A Policeman Must Know The Constitution, Then Why Not A Planner?"²⁴

Another venture of the County through the looking glass appears in its discussion of Justice Brennan's dissenting opinion in *San Diego Gas*. (See County pp 45-46.) There are at least two things wrong with this portion of the County's brief.

First. The County pins its argument to a discussion of police and planning practices in the *White River Junction Manifesto*. (See note 2 herein.) Despite the extensive land use experience of the authors of the *Manifesto* on behalf of government agencies, they apparently have little understanding of Constitutional law as it relates to police practice. They assumed that what Justice Brennan was referring to in his *San Diego Gas* dissent was merely the *Miranda* warning. (See 9 Vt. L. Rev. at 196, 225.)

Given this Court's familiarity with Constitutional cases involving police officers, First Church will not burden this

²³ Of importance, in this regard, is the totality of the restriction at bench (JA 12), which the County did not challenge below. As this Court noted in *Penn Central*, 438 US at 127:

"It is, of course, implicit in *Goldblatt* that a use restriction on real property may constitute a 'taking' . . . if it has an unduly harsh impact upon the owner's use of the property."

²⁴ *San Diego Gas & Elec. Co. v. City of San Diego* (1981) 450 US 621, 661, n. 26 (Brennan, J., dissenting).

brief with citations. Suffice it to observe that, in addition to reading his "*Miranda* card" to a suspect, a policeman must also know the Constitutional implications of reliance on informers, detention and arrest and legitimate, articulable bases therefore, search and seizure, with and without warrants (including the complexities applicable to motor vehicles), the permissible use of force in making the arrest, and — after the "*Miranda* card" has been duly read — what constitutes a proper waiver of the right to remain silent and the right to counsel. These are all topics whose Constitutional contours may be unclear, to say the least, and which regularly inspire dissent among members of this Court.

Second. Thus, concludes the County, "[t]he policeman/planner equation is logically and linguistically attractive, but bears no relation to how the system actually works." (County p 45)

How true that is. The policeman, reacting instantly to deadly peril, all alone in a dark alley, often with limited legal education and experience, still must know *and obey* the Constitution — and be accountable for refusing to do so.

The municipal land use establishment — by contrast — takes no step without the omnipresent advice of legal counsel and expert consultants, and is thus fully advised of its responsibilities. Moreover, it acts at leisure (often taking years to reach a decision).²⁵ There is no conceivable reason why it should claim for itself a *lesser* standard of Constitutional responsibility than the policeman. (See Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls* [1983] 15 Rutgers L Rev 15, 99.)

²⁵ For example, the ordinance in the case at bench was under study for at least 3 years before being adopted as a permanent ordinance. For a discussion of *when* a regulatory taking occurs, see Appellant's Brief p 31, n. 41.

Thus, to the extent that the County and its *Amici* express concern about the surprising and potentially unknowable impact of the legislation which they are drafting, they are pulling this Court's leg.²⁶

Justice Brennan's conclusion was exceedingly apt. Government agencies have available to them not only the advice of their own counsel but the able consulting advice of organizations such as those who have filed *Amicus Curiae* briefs in support of the County. They are more than adequately advised when they take these steps. Enactment of such legislation extends for lengthy periods of time, and includes numerous hearings at which both supporting evidence and the complaints of affected property owners is heard. It is something of a bad joke for them to try to pass themselves off to this Court as untutored, uncounseled, unsophisticated hayseeds, needful of this Court's protection. They are, in fact, the government — powerful and in need of Constitutional restraint.

CONCLUSION

It is time to end the confusion. When a regulation *actually takes* private property, and leaves its nominal "owner" nothing useful, the Constitution promises just compensation.

First Church prays that the judgment be reversed. The allegations show a taking. What is needed is an opinion which makes it clear that when First Church proves a taking of its property by the County, just compensation is mandated.

Respectfully submitted,

²⁶ See App. 1 hereto which is a County report noting that at a meeting several years before the permanent ordinance in this case was adopted, representatives of First Church explained to the County that adoption of the ordinance would render their property unuseable and valueless.

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English Evangelical Lutheran
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APPENDIX 1

-A 1-

LOS ANGELES COUNTY
FLOOD CONTROL DISTRICT

NOTE

TO: Mr. K. W. Kummerfeld October 3, 1978
Program Management Division

FROM: John L. Wallace
Program Management Division

SUBJECT: Report on Flood Plain Management Meeting
for Hidden Springs September 26, 1978

We presented the second installment of our Flood Protection Area/Flood Plain Management Plan to the residents of Hidden Springs on the evening of September 26, 1978. There were 24 people in attendance including Bob Pratt from Supervisors [sic] Ward's office. All property owners were represented except the widow of the owner of the Hidden Springs Camp.

At our previous meeting in June, we introduced the concept of a flood protection setback area to the community and indicated that for the next meeting, we would update the topography in order to better locate the flood hazard area. In the intervening period between community meetings, we had discussions with several of the property owners regarding the effect of the setback area on their properties.

At last night's meeting, two major concerns were expressed.

1. The flood protection setback boundaries would not allow rebuilding, severely restrict the use of property, and virtually eliminate the investment of some of the owners. This view was primarily expressed by the owners of Luther Glen Camp at the lower end of the canyon.
2. A sizeable portion of the community was convinced that the disaster which occurred on February 10, 1978 came about as a result of the culverts at the road crossing plugging, ponding water, and then collapsing, releasing the large flows which destroyed the improvements in the canyon bottom. Our proposed setback area is slightly larger than the flood limits experienced on February 10, 1978. Some people felt that our setback area is too wide if the collapse of the road fill caused the wide flood plain. Other people felt the brown area is not wide enough if it does not consider the effect of a future collapse of the road fill.

APPENDIX 2

-A 3-

Project Planning (FPM)

LOS ANGELES COUNTY
FLOOD CONTROL DISTRICT

MEMORANDUM

TO: Mr. John M. Tettemer DATE: May 22, 1978

FROM: C. J. Wilt
Project Planning Division

FILE NO. 63.41 Big Tujunga Dam Reservoir-Mill Creek
Flood Protection Area Study (Hidden Springs)

* * *

Mr. John M. Tettemer
Page 2
May 22, 1978

Hidden Springs is an incised canyon and has no flood fringe that could accommodate development on elevated foundations. Therefore, we are equating the flood protection area with the capital Q flood plain, including an additional setback for erosion.

A precise boundary map, using the available topographic maps would be very difficult to determine and describe since the flood plain contact line is very irregular and the contour interval is 40 feet. We believe the best approach for administering a setback for situations like this is to

-A 4-

publish an approximate boundary map but use water surface elevations as the final control in establishing a setback distance.

Construction proposed on the canyon floor or falling well within the flood protection area could be prohibited without further calculations. When construction is proposed near the approximate boundary of the flood protection area, building permit applicants would be required to furnish a cross section of the canyon's natural ground surface at the proposed building side. We would then use the water surface shown on the attached plan in addition to an erosion setback (see attached sketch) to determine the flood protection area boundary.

We have requested Survey Division to provide us with new topographic maps of the area. These will be used to more precisely plot a setback boundary which then can be administered like previously adopted maps. In the meantime, an interim ordinance for Hidden Springs will be a modification of our earlier interim ordinance for Sand Canyon and will use water surface elevations as a control as well as a boundary map.

John L. Wallace
Flood Plains Management Section

MCH:jm
Attach. 2

cc: Project Planning (FPM)
General Files

APPENDIX 3

-A 5-

FACTUAL REPORT
AND
NEGATIVE DECLARATION ATTACHED
FOR
FLOOD PROTECTION DISTRICT CASE NO. 3-(5)

HEARING DATE: OCTOBER 1, 1980

Prepared by:

Norman B. Nelson
Zone Change Section
Department of Regional Planning

FLOOD PROTECTION CASE NO. 3-(5)
PAGE THREE

SECTION II - PROJECT DESCRIPTION

A. Location

The subject property, located in the Mt. Gleason Zoned District, is a linear shaped parcel approximately 250 feet in width and approximately 3600 feet in length, beginning at the intersection of the Mill Creek Bridge and Angeles Forest Highway and following the drainage course along Angeles Forest Highway in a northerly direction to a point approximately 300 feet easterly of Angeles Forest Highway.

B. Objective

The request is the creation of a Flood Protection District.

One strategy in Los Angeles County's [sic] comprehensive program to insure compliance with the requirements of the federal flood program is the designation of flood protection areas along designated stream beds within the unincorporated County area. This is accomplished by the prohibition of buildings and major structures within an area reserved for flood flows which includes both the existing wash or channel and additional area as may be necessary to

provide reasonable protection from overflow of flood waters, bank erosion and debris deposition.

C. Relationship to Surrounding Area

1. General Information

a. General Plan

The subject property is shown as "Non-Urban" (Conservation) on the "Definition of Los Angeles County Land Use Areas" map.

The subject property is within a "Special Management Zone."

The 1990 Land Use Policy Guide Map No. 45 designates the subject property as N2 (Rural II).

The Los Angeles County Proposed General Plan, as recommended by the Regional Planning Commission to the Board of Supervisors on March 2, 1979, designates the subject property as) - Open Space (National Forest).

AMICUS CURIAE

BRIEF

(17)
No. 85-1199

Supreme Court, U.S.
FILED

NOV 4 1986

JOSEPH E. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

**FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH
OF GLENDALE, APPELLANT**

v.

COUNTY OF LOS ANGELES, CALIFORNIA

**ON APPEAL FROM THE COURT OF APPEAL OF
CALIFORNIA, SECOND APPELLATE DISTRICT**

**BRIEF FOR THE UNITED STATES AS
AMICUS CURIAE SUPPORTING APPELLEE**

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4710

QUESTIONS PRESENTED

1. Whether this Court has either appellate or certiorari jurisdiction of this case under 28 U.S.C. 1257(2) or (3).

2. Whether appellant's claim that the County Ordinance prohibiting the building of structures in a flood district results in a "taking" of its property without just compensation is ripe for judicial determination.

3. Whether the Fifth and Fourteenth Amendments, of their own force and without reliance on the statutory damages remedy in 42 U.S.C. 1983 enacted by Congress pursuant to Section 5 of the Fourteenth Amendment, require a state court to enter a money judgment against a governmental entity when the court concludes that a regulatory measure adopted by that entity results in a "taking" of private property.

4. Whether a local regulation prohibiting the building of structures on land within a validly designated flood control district results in a "taking" of property within the meaning of the Fifth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1199

FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH
OF GLENDALE, APPELLANT

v.

COUNTY OF LOS ANGELES, CALIFORNIA

ON APPEAL FROM THE COURT OF APPEAL OF
CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS
AMICUS CURIAE SUPPORTING APPELLEE

INTEREST OF THE UNITED STATES

This case presents the question whether the Fifth Amendment to the United States Constitution, as made applicable to the States through Section 1 of the Fourteenth Amendment, requires a court to enter a money judgment against a local governmental entity if it finds that a regulatory measure results in a taking of property without just compensation. The Federal Government administers a broad range of regulatory programs that could give rise to similar claims for money damages. Moreover, several federal programs require or encourage state and local restrictions on development in floodplain, wetlands, and tidal areas. See, e.g., the National Flood Insurance Act of 1968, 42 U.S.C. (& Supp. II) 4101 *et seq.*; the Coastal Zone Management Act of 1972, 16 U.S.C. 1451(b) and (d), 1452(2)(a). Accordingly, the United States has a substantial interest in the development of stable and balanced doctrine in the area

ditions do not also specify the appropriate relief in the event that the conditions are not performed. Indictment is not a *remedy* for the government's holding of a person to answer for an infamous crime, any more than due process is a *remedy* for a deprivation of life, liberty, or property. It is a reasonable parallel construction of the Amendment to conclude that the availability of just compensation, while an essential condition of a constitutional taking, was not prescribed by the Fifth Amendment as the judicial remedy for an unconstitutional one.⁹

2. Other Indicia of the Drafters' Intent

Three important indicia of original intent point to the conclusion that there is no self-effectuating damage remedy available under the Fifth Amendment. These indicia are particularly compelling when it is recalled that the Fifth Amendment is directly applicable only against the United States and that appellant's argument therefore implicitly asserts that the Fifth Amendment mandates a monetary remedy against the United States.

a. The most obvious obstacle to such an interpretation of the Fifth Amendment is the sovereign immunity of the United States to suit, absent a waiver by Congress of that immunity.¹⁰ That immunity was

⁹ The validity of this interpretation is reinforced by the identical language used in the Due Process and Just Compensation Clauses, each of which introduces the condition to the lawful exercise of governmental authority by the word "without." Compare *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 153 & n.19 (1982), where the Court attached significance to the parallel structure of the Foreign and Indian Commerce Clauses, both of which are introduced by the word "with": Congress is empowered "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art. I, § 8, Cl. 3 (emphasis added).

¹⁰ A suit is plainly one against the sovereign if the judgment would expend itself on the public treasury. *Dugan v. Rank*, 372 U.S. 609, 620 (1963).

well understood by the Framers of the Constitution. As Alexander Hamilton explained with respect to the sovereign immunity of the States:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.

The Federalist No. 81, at 487 (C. Rossiter ed. 1961) (emphasis in original). Hamilton stressed that the Constitution did not work a surrender of the immunity of the States (*ibid.*), and the Constitution likewise did not withhold this essential "attribute[] of sovereignty" from the Government of the United States. See, e.g., *California v. Arizona*, 440 U.S. 59, 61-62, 65 (1979); *Kansas v. United States*, 204 U.S. 331, 342 (1907). Nor is there any indication that this immunity was dispensed with by the Fifth Amendment, which was proposed to the States for ratification only two years after the Constitution was proposed. This silence is fatal, because only an explicit waiver of sovereign immunity will suffice. See *Library of Congress v. Shaw*, No. 85-54 (July 1, 1986), slip op. 6.¹¹ In fact, this Court has made clear

¹¹ The importance attached to the doctrine of sovereign immunity at the time the Fifth Amendment was adopted is confirmed by the fact that the decision in *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), "created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 97 (1984), quoting *Monaco v. Mississippi*, 292 U.S. 313, 325 (1934).

The Takings Clause of the Fifth Amendment thus seems distinguishable from the parallel provisions of state constitutions which have been found to constitute waivers of state sovereign immunity. See, e.g., *Wilson v. Beville*, 47 Cal.2d 852, 860, 306 P.2d 789 (1957); *Trippe v. Port Authority*, 35 Misc.2d 744, 231 N.Y.S.2d 818, 821-823 (1962); *Burns v. Board of Supervisors*, 218 Va. 625, 238 S.E.2d 823, 825 (1977). See also *Developments in the*

that Congress may bar suits for monetary relief against the United States even where it is alleged that a statute results in a taking of property without just compensation (*Lynch v. United States*, 292 U.S. 571, 579, 580-582 (1934)), because "[t]he rule that the United States may not be sued without its consent is all embracing" (*id.* at 581). See also *Schillinger v. United States*, 155 U.S. 163, 168 (1894); cf. *United States v. Lee*, 106 U.S. 196, 205-206, 218 (1882); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 696-697 & nn.17-18 (1949); *id.* at 717-718 & n.10 (Frankfurter, J., dissenting).

b. Quite aside from the United States' immunity to suit as a general matter, the Constitution provides that "No Money shall be drawn from the Treasury, but in consequence of Appropriations made by Law." Art. I, § 9, Cl. 7. This provision independently bars a court from ordering the payment of money out of the Federal Treasury unless Congress has created a damage remedy. See *Reese v. Walker*, 52 U.S. (11 How.) 272, 291 (1850).

c. It also is instructive to consider the remedy that the Constitution expressly contemplates for certain types of constitutional violations—those involving a deprivation of liberty without due process. Article I, § 9, Cl. 2 provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion, the public Safety may require it." Unlike the damage action appellant advocates, a habeas corpus proceeding is instituted not against the sovereign itself, but against the responsible governmental official on the basis that continued imprisonment under present conditions is illegal. See *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. at 690. Moreover, the consequence

Law—Remedies Against the United States and Its Officials, 70 Harv. L. Rev. 827, 876-881 (1957).

of the issuance of the writ is to require the officer having custody of the petitioner to release him from custody, and thereby restore his liberty to him.

Such relief is directly analogous to an injunction or writ of mandamus to prevent a government officer from enforcing a statute or regulation that is found to deprive a person of his property without due process or just compensation. The latter relief, as provided in California under the *Agins* rule, has the prospective effect of restoring the owner's property to him. See 337 U.S. at 690; *United States v. Lee*, 106 U.S. at 218-220.

3. Judicial Construction of the Compensation Requirement

a. The early interpretation of the compensation guarantee under the Fifth Amendment, state constitutions, and the common law also establishes that it was understood not as a basis for awarding money damages against the government for uncompensated takings of private property, but rather as a condition on the lawful exercise of the power of eminent domain. Of particular interest is the interpretation of Article X of the Declaration of Rights in the Massachusetts Constitution of 1780, which was one of the principal precursors of the Takings Clause.¹² The Supreme Judicial Court explained the operation of the provision in *Callender v. Marsh*, 18 Mass. 418, 430-431 (1823) (emphasis added):

Thus if by virtue of any legislative act the land of any citizen should be occupied by the public for the erection of a fort or any public edifice upon it, without any means provided to indemnify the owner of the property, the title of the owner could not be divested thereby, and he

¹² See Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 701, 706-708 (1985). Article X is quoted in relevant part at n.8, *supra*.

might maintain his action for possession, or of trespass, against those who are instrumental in the act; because such a statute would be directly contrary to the above cited provision; and as no action can be maintained against the public for damages, the only way to secure the party in his constitutional rights would be to declare void the public appropriation.^[13]

Other state court decisions were to the same effect. See *Bradshaw v. Rodgers*, 20 Johns. Rep. 103, 106 (N.Y. 1822) ("any law violating that principle must be deemed a nullity"); *Sinnickson v. Johnson*, 17 N.J. L. 129, 151 (1839) ("the remedy can only be by contesting the constitutionality of the law, or appealing to the justice and magnanimity of the legislature"); *Parham v. The Justices*, 9 Ga. 341, 349 (1851) ("the Legislature must make provision for compensation. If it does not, the Courts may pronounce the law a nullity"); *id.* at 391 (just compensation requirement is a "limitation" on the exercise of the power of eminent domain); *Ex parte Martin*, 13 Ark. 198, 211-212 (1853), (no suit lies against the state, but its agents are liable in trespass); *Picatagua Bridge v. New Hampshire Bridge*, 7 N.H. 35, 66 (1834) ("limitation"); *Petition of Mt. Washington Rd. Co.*, 35 N.H. 134, 142 (1857) ("a legislative act could not be legally enforced which should undertake to appropriate private property to public use without

¹³ Accord *Perry v. Wilson*, 7 Mass. 393, 395 (1811) ("But in this statute, no compensation is provided, nor any means of ascertaining or securing the payment of it declared. If, then, the act was construed to be an appropriation of the plaintiff's lot for the use of the public, such appropriation would be unconstitutional and void."); *Baker v. City of Boston*, 29 Mass. (1 Pick.) 184 (1831) ("But it is true, undoubtedly, that the property of a private individual may be appropriated to public use, in connection with measures of municipal regulations; and in such case compensation must be provided for, or the appropriation will be unconstitutional and void.").

provision for compensation to the owner"). See also *Respublica v. Sparhawk*, 1 U.S. (1 Dall.) 357, 360 (Pa. 1788) (stating in a suit seeking damages for a seizure of property by the government that the "sovereign is not amenable in any Court unless by his own consent"); T. Cooley, *Constitutional Limitations* 760 (7th ed. 1903) ("conditions precedent").

b. Many of this Court's decisions have construed the compensation requirement in a similar manner. In no case has this Court ever expressly held that the Fifth Amendment, standing alone and without further congressional action, mandates a damage remedy against the United States.

In the landmark decision in *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897), which held that the condition of just compensation applies to the States through Section 1 of the Fourteenth Amendment, the Court noted that it previously had stated that "it was a *condition precedent* to the exercise of the power of eminent domain that the statute make provision for reasonable compensation to the owner." 166 U.S. at 238 (emphasis added), citing *Searl v. School District*, 133 U.S. 553, 562 (1890), and *Sweet v. Rechel*, 159 U.S. 380, 398-399 (1895). Accord *United States v. Jones*, 109 U.S. 513, 518 (1883) (the compensation requirement "is no part of the [eminent domain] power itself, but a condition upon which the power may be exercised"); *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833) (Takings Clause is "a limitation of the exercise of power by the government").

Moreover, in cases arising under the Tucker Act, the government waives its sovereign immunity so as to make available the just compensation necessary to complete a constitutionally valid exercise of the taking power. In this connection, the Court in *Schillinger v. United States*, 155 U.S. 163 (1894), was at pains

to make clear that the waiver of sovereign immunity in the Tucker Act did not lay the government open to suit for money damages in respect to every wrongful act by the government or its agents which injures an individual in his property interests. *Id.* at 168. See also *United States v. Lynch*, 292 U.S. at 582. Compare 28 U.S.C. 2680(a); *United States v. Varig Airlines*, 467 U.S. 797, 809-810, 814 (1984).

This same view in fact is reflected in *Pennsylvania Coal Co. v. Mahon*, the Court's seminal decision holding that land-use regulations that are within the permissible scope of a State's police power may nevertheless go "too far" and "be recognized as a taking." 260 U.S. at 415. The Court stated that in most, if not all cases, in which the diminution in value occasioned by regulation reaches a certain magnitude, "there must be an exercise of eminent domain and compensation to sustain the act." *Id.* at 413; see also *id.* at 400, 416. The Court thus again regarded the availability of compensation as a condition to a constitutional taking, not as a damage remedy for a completed, but as yet uncompensated taking, as appellant maintains. Accord *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) (the Government "may not, without invoking its eminent domain power and paying just compensation, require [the landowner] to allow free access to the dredged pond"); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (referring to the question "whether a particular restriction will be rendered invalid by the government's failure to pay"); *Williamson County*, slip op. 25 (collecting cases).

More generally, the interpretation of the Takings Clause urged by appellants would effectively permit a court, at the behest of a private person, to require the United States Government to exercise the power of eminent domain and to direct the expenditure of

funds out of the Treasury to pay for the property so acquired—and to do so in the absence of any congressional authorization for either part of that judicially mandated exchange. We seriously doubt that the Framers believed that a court has the authority to interfere in this manner with the judgment of the political branches. To the contrary, this Court has made clear that whether to exercise the power of eminent domain is "‘for Congress and Congress alone to determine.’" *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984) (quoting *Berman v. Parker*, 348 U.S. 26, 33 (1954)). See also *Mitchell v. United States*, 267 U.S. 341, 345 (1925); n.11, *supra*.¹⁴

c. A number of decisions of this Court contain language which might, in isolation, be taken to suggest the existence of a damage remedy under the Takings Clause. When read in full, however, we think it plain that these decisions do not in fact recognize any such constitutional remedy.

In *Jacobs v. United States*, 290 U.S. 13 (1933), involving suits brought under the Tucker Act in connection with the flooding of land, the Court stated (*id.* at 16):

The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right.

¹⁴ The Property Clause provides that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Art. IV, § 3, Cl. 2. This Clause vests Congress with "complete power" over the property of the United States. *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976).

It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment.

Because the plaintiffs' claims in *Jacobs* were made pursuant to the Tucker Act, in which Congress has waived the United States' immunity to suit, this passage cannot be read to suggest that a court could order the payment of a money judgment out of the Federal Treasury even where Congress has *not* waived that immunity. Further, there was no dispute in *Jacobs* that a taking of property giving rise to a right to recover compensation under the Tucker Act had occurred. To the contrary, the Court observed that "[t]he Government contemplated the flowage of the lands, that damage would result therefrom, and that compensation would be payable" (290 U.S. at 16). Indeed, in the very passage quoted above, the Court stated that the Tucker Act suits were based on the right to just compensation for property taken by the United States "in the exercise of its power of eminent domain" (*ibid.*).¹⁵

More recently, the Court's opinion in *United States v. Clarke*, 445 U.S. 253 (1980), contained a passage referring to the "'self-executing character of the constitutional provision with respect to compensation'" (*id.* at 257, quoting 6 P. Nichols, *Eminent Domain* § 25.41 (3d rev. ed. 1972)). *Clarke*, however, presented a question of statutory construction, not con-

¹⁵ The only question in *Jacobs* was whether interest was required to be paid from the date of the taking, and in that context the Court rejected the argument that interest could be withheld because there was no promise to pay it. Thus, *Jacobs* simply holds that where Congress, attendant to the exercise of the eminent domain power, has made just compensation available by authorizing an inverse condemnation action under the Tucker Act, the *measure* of that compensation is prescribed by the Constitution.

stitutional law. Specifically, it concerned the interpretation of 25 U.S.C. 357, which permits Indian lands to be "condemned" pursuant to state law. The Court held that this statute did not permit a city to acquire Indian property through "inverse condemnation"—i.e., by physically occupying the property and remitting the Indian owner to a suit against the state to recover compensation. The Court's reference to the "self-executing character" of the constitutional provision as regards compensation was merely part of its description of the nature of an inverse condemnation action. Because such an action concededly was available under state law (see 445 U.S. at 259), there was no question raised concerning the availability of monetary relief if the state legislature had not so provided.

Moreover, the asserted premise of the availability of compensation under state law in *Clarke* was that "Alaksa law allows the 'exercise of the power of eminent domain through inverse condemnation or a taking in the nature of inverse condemnation'" (445 U.S. at 259 (quoting Brief of Respondent Municipality of Anchorage at 16)). Similarly, the Court elsewhere in its opinion referred to "the *choice of the condemning authority* to take property by physical invasion rather than by formal condemnation proceedings" (445 U.S. at 258 (emphasis added)). *Clarke* therefore does not suggest that the Constitution requires a damages remedy where the government has not waived its sovereign immunity.¹⁶

¹⁶ In addition to *Jacobs v. United States* and *United States v. Clarke*, Justice Brennan's dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 636-661 (1981), cited several other decisions of this Court as supportive of a damage remedy arising directly from the Takings Clause. However, *United States v. Causby*, 328 U.S. 256 (1946) (see 450 U.S. at 655), like *Jacobs*, was a suit under the Tucker Act, and it therefore likewise does not suggest that a court may award a money judgment against the United States where Congress has not consented to such

In sum, the text, background, and judicial construction of the Fifth Amendment all argue forcefully against appellant's contention that the Takings Clause, of its own force, requires that monetary relief be available against the government where a regulation is found to result in an unconstitutional taking of property.

D. The Application Of The Takings Clause Of The Fifth Amendment To The States Through Section 1 Of The Fourteenth Amendment Likewise Does Not Give Rise To A Constitutionally Compelled Damage Remedy Against The Government

The foregoing discussion of the Fifth Amendment demonstrates that the Takings Clause's prohibition of uncompensated takings does not imply a constitutionally-based compensation remedy where the prohibition has been violated. As this Court explained in *Chicago B. & Q. R.R. v. Chicago*, 166 U.S. at 235-241, an uncompensated transfer of private property

a suit. Moreover, there was no dispute in *Causby* that compensation was available under the Tucker Act in the circumstances of that case if a taking were found; the only dispute was whether the overflights amounted to a taking. Cf. 328 U.S. at 261 ("the United States conceded on oral argument that if the flights over respondents' property rendered it uninhabitable, there would be a taking compensable under the Fifth Amendment").

Likewise, *United States v. Dickinson*, 331 U.S. 745 (1947) (see 450 U.S. at 655 n.21), arose under the Tucker Act, and it presented only a question of the application of the statute of limitations. That question is not involved here. Similarly, *Griggs v. Allegheny County*, 369 U.S. 84 (1962) (see 450 U.S. at 665), arose under a parallel state procedure that provided for the payment of compensation if the governmental action involved were held to result in a taking. See 369 U.S. at 85.

Finally, Justice Brennan's dissenting opinion in *San Diego Gas* quoted (450 U.S. at 652-653) the statement in Justice Stewart's concurring opinion in *Hughes v. Washington*, 389 U.S. 290, 298 (1937), that "the Constitution measures a taking of property not by what a State says, or what it intends, but by what it does." *Hughes*, however, raised no question of the availability of a monetary remedy against the sovereign; it involved only prospective relief in a title dispute.

to the government for public use, because of the lack of compensation alone, violates the Fourteenth Amendment's prohibition of deprivations of property without due process of law.¹⁷ The Due Process Clause, like the Takings Clause, is a prohibition on certain deprivations of property by the government.¹⁸ If, as we have demonstrated, the Takings Clause, which actually refers to just compensation, does not imply a monetary remedy for its violation, than *a fortiori* the Due Process Clause, a prohibition which does not refer to compensation at all, does not give rise to a monetary remedy either.

Any doubt as to whether the prohibitions in Section 1 of the Fourteenth Amendment imply a monetary remedy is dispelled by the language and history of Section 5 of the Amendment, which explicitly grants control over remedies to Congress. Section 1 of the Fourteenth Amendment provides that no State may deprive "any person of * * * property, without due process of law." Section 5 vests Congress with the "power to enforce, by appropriate legislation, the provisions of" the Amendment. As the structure of the Amendment would suggest, the responsibility for fashioning affirmative remedies for violations of Section 1 was reserved to Congress. Given this explicit textual commitment, Section 1 cannot be understood to have imposed directly on states a self-effectuating monetary remedy.

The origins and judicial interpretation of the Fourteenth Amendment lend support to this conclusion. For example, Senator Howard, who introduced the proposed Amendment in the Senate, said of Section 5:

¹⁷ The Fifth Amendment does not directly apply to the States. *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

¹⁸ The Privileges and Immunities Clause and the Equal Protection Clause, which also are contained in Section 1 of the Fourteenth Amendment, likewise are prohibitory in nature.

It casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the Amendments are carried out in good faith, and that no State infringes the rights of persons or property. I look upon the clause as indispensable for the reason that it thus imposes upon Congress this power and duty.

Cong. Globe, 39th Cong., 1st Sess. 2768 (1866). Similarly, Congressman Stevens introduced the proposed Amendment in the House with these words (*id.* at 2459):

[T]he Constitution * * * is not a limitation on the States. This Amendment supplies that defect, and allows Congress to correct unjust legislation of the States * * *.

This Court, too, has often acknowledged that the Fourteenth Amendment contemplates that Congress will have primary authority to direct the enforcement of its provisions.¹⁹ In *Ex parte Virginia*, 100 U.S. 339 (1879), decided just 11 years after adoption of the Amendment, the Court so described Section 5 (100 U.S. at 345-346 (emphasis added)):

It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. *Some legislation is contemplated to make the amendments fully effective.* Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission, to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State

¹⁹ See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641, 653-656 (1966); *United States v. Guest*, 383 U.S. 745, 783 n.7 (1966) (Brennan, J., concurring in part and dissenting in part) ("the primary purpose of the Amendment was to augment the power of Congress, not the judiciary").

denial or invasion, if not prohibited, is brought within the domain of congressional power.^[20]

And again in *The Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 81 (1872):

If, however, the states did not conform their laws to its requirements, then by the Fifth section of the article of amendment Congress was authorized to enforce it by suitable legislation. * * * But as it is a state that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of state oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands.^[21]

²⁰ Justice Black took a similar view of the Amendment in his dissent in *Harper v. Virginia Board of Elections*, 383 U.S. 663, 678-680 (1966):

Moreover, the people, in § 5 of the Fourteenth Amendment designated the government tribunal they wanted to provide additional rules to enforce the guarantees of that Amendment. The branch of Government they chose was not the Judicial Branch but the Legislative.

* * *

Thus § 5 of the Fourteenth Amendment in accordance with our constitutional structure of government authorized the Congress to pass definitive legislation to protect Fourteenth Amendment rights which it has done many times, e.g., 42 U.S.C. § 1971 (a). For Congress to do this fits in precisely with the division of powers originally entrusted to the three branches of government—Executive, Legislative and Judicial.

²¹ Similarly, Professor Flack states in his comprehensive analysis of the historical origins of the Amendment:

The declarations and statements of newspapers, writers and speakers * * * show very clearly, * * * the general opinion held in the North. That opinion, briefly stated, was that the Amendment embodied the Civil Rights Bill and gave Congress the power to define and secure the privileges of citizens of the United States.

H. Flack, *The Adoption of the Fourteenth Amendment* 153 (1908). See generally J. ten Broek, *The Antislavery Origins of the Fourteenth Amendment* 187-215 (1951).

Consistent with the preeminent role of congressional enforcement under Section 5, this Court has been reluctant to permit a cause of action in federal court directly under the Fourteenth Amendment, unaided by congressional legislation. See *e.g.*, *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 398-400 (1979); *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 277-278 (1977); *Aldinger v. Howard*, 427 U.S. 1, 4 n.3 (1976). The Court should be even more reluctant to *compel* a cause of action for money damages against a local governmental entity in state court. Inevitably, "[t]he manner of enforcement [of the Fourteenth Amendment] involves discretion" (*Oregon v. Mitchell*, 400 U.S. 112, 143 (1970) (Douglas, J., concurring and dissenting)), because of the need to assess on a nationwide scale the nature and extent of constitutional violations, to weigh competing considerations of federal, state, and local policy, and to revise the enforcement mechanisms if experience warrants. These are at bottom legislative determinations, and therefore "discretion is largely entrusted to the Congress not the courts" (*ibid.*).

E. In 42 U.S.C. 1983, Congress Has Created A Substantial Remedy For Regulatory Takings, Which Appellant Has Not Attempted To Invoke In This Case

Congress has exercised its authority under Section 5 of the Fourteenth Amendment by enacting 42 U.S.C. 1983 to protect against interference with constitutional rights under color of state law. As the Court observed in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), Section 1983 was enacted with the problem of the appropriation of private property without compensation specifically in mind. See 436 U.S. at 685-686 & n.45; see Cong. Globe App., 42d Cong., 1st Sess. 84-85 (1871) (remarks of Rep. Bingham). Whatever might have been

the case if Congress had not entered the field, Congress's enactment of 42 U.S.C. 1983 has eliminated any need for this Court to explore implicit constitutional remedies to be applied against governmental bodies acting in the area of local land-use regulation. Cf. *Lake County Estates*, 440 U.S. at 399-400; *Bush v. Lucas*, 462 U.S. 367, 379-380, 389-390 (1983). That statutory remedy is subject to amendment and refinement if experience warrants, and reliance on that remedy will avoid the serious potential for harm in an inflexible, constitutionally-based monetary remedy.²²

²² In response to the holding in *Monroe v. Pape*, 365 U.S. 167, 180 (1961), that municipalities were not subject to suit under Section 1983, several courts of appeals initially implied rights of action directly under the Fourteenth Amendment in federal court in order to provide aggrieved plaintiffs with some remedy for civil rights violations. See, *e.g.*, *Turpin v. Mailet*, 579 F.2d 152, 159 (2d Cir.) (en banc), vacated *sub nom.* *City of West Haven v. Turpin*, 439 U.S. 974 (1978). When *Monroe* was overruled in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), these courts were forced to reconsider the propriety of an implied cause of action, in light of the availability of the remedial legislation. Those courts of appeals uniformly concluded that "there is no place for a cause of action against a municipality directly under the Fourteenth Amendment, because the plaintiff may proceed against the city * * * under § 1983." *Turpin v. Mailet*, 591 F.2d 426, 427 (2d Cir. 1979) (en banc), cert. denied, 449 U.S. 1016 (1980). Accord *Owen v. City of Independence*, 589 F.2d 335, 337 (8th Cir. 1978) ("[b]y enacting Section 1983, Congress has provided an appropriate and *exclusive* remedy for constitutional violations committed by municipalities") (emphasis added), rev'd on other grounds, 445 U.S. 622 (1980); *Rogin v. Bensalem Township*, 616 F.2d 680, 686 (3d Cir. 1980), cert. denied, 450 U.S. 1029 (1981); *Bishop v. Tice*, 622 F.2d 349 (8th Cir. 1980); *Cale v. City of Covington*, 586 F.2d 311 (4th Cir. 1978); *Molina v. Richardson*, 578 F.2d 846 (9th Cir.), cert. denied, 439 U.S. 1048 (1978); *Morris v. Washington Metro. Area Transit Authority*, 702 F.2d 1037, 1042 n.10 (D.C. Cir. 1983). Even prior to *Monell*, several courts denied the availability of such an implied remedy. See, *e.g.*, *Kostka v. Hogg*, 560 F.2d 37 (1st Cir. 1977). See also *Huemmer v. Mayor of Ocean City*, 474 F. Supp. 704, 712-718 & nn. 8-15 (D. Md. 1979) (collecting authorities), aff'd in part and rev'd in part, 632 F.2d 371 (4th Cir. 1980); *Mahone v. Waddle*, 564 F.2d 1018 (3d Cir. 1977), cert. denied, 438 U.S. 904 (1978).

In this case, appellant did not rely on 42 U.S.C. 1983 in the California courts; nor has it done so in this Court. There accordingly is no reason for the Court in this case to elaborate upon the application of the statutory damage remedy in Section 1983 where it is properly invoked. It nevertheless may be useful to consider that issue briefly here.

There is no occasion to resort to a federal remedy under Section 1983 where the state has made provision for the payment of compensation in an action for inverse condemnation in state court. *Williamson County*, slip op. 20-23. Under that system, the affected property interest is transferred to the government when the restriction becomes effective or a permit is finally denied. Just compensation is available beginning as of that date for the fair market value of whatever property is taken, whether the taking be permanent or terminated by rescission of the agency's action after a period of time.

By contrast, the Section 1983 damage remedy may play a more important role under the system of land-use regulation contemplated by *Agins*. To be sure, California is free under the Federal Constitution to withhold from governmental officials the authority to commit public money and thereby appropriate private property in a manner consistent with the Fifth Amendment.²³ Under such

²³ In this regard, the *Agins* rule deprives state regulators of the option of preserving permanently an excessive regulation by electing to pay a landowner "just compensation" for the property interest lost. Cf. *San Diego Gas*, 450 U.S. at 653 n.19. California thus mandates that in every instance of overburdensome regulation, the action must be invalidated. Compare *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974) (presuming the availability of compensation under the Tucker Act to sustain federal legislation found to result in a taking). If a California regulatory agency wishes to reinstate the regulation, it must secure legislative approval for a formal eminent domain proceeding and cannot rely

a regime, regulations that do constitute a taking must be struck down as unconstitutional because no compensation has been made available through an inverse condemnation or similar action. Relief lifting the offending restrictions removes any claim of constitutional injury insofar as its future effects are concerned. See *San Diego Gas*, 450 U.S. at 658; *MacDonald*, slip op. 10 n.4 (White, J., dissenting). Yet, since temporary invasions, like more permanent regulatory takings, may violate the Fifth Amendment Takings Clause (see pp. 10-11, *supra*), the *Agins*-type regime may leave a gap in the remedial fabric. Prospective invalidation of the regulation or permit denial of course will not necessarily undo the effects of whatever limitations on the use or development of the property were applicable on a temporary basis while the validity of the restrictions was being litigated in the suit for mandamus or declaratory relief.

The availability of a Section 1983 damages remedy fully redresses this defect, however.²⁴ When regulations by authorities in states with the *Agins*-type

upon judicially-ordered compensation to protect its regulatory program.

This is not to say that excessive regulations do not constitute a taking within the meaning of the Fifth Amendment merely because compensation is not made available by the sovereign through a suit for inverse condemnation. Government cannot classify retrospectively the character of its actions so as to frustrate constitutional rights. See, e.g., *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1012 (1984); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). The essential point is that the absence of compensation renders any taking that results unconstitutional. That unconstitutional action in turn gives rise to a cause of action for damages under 42 U.S.C. 1983.

²⁴ Of course, in order for a municipality to be liable under 42 U.S.C. 1983, the allegedly unconstitutional action must have been taken pursuant to the official policy of the municipality. *Pembaur v. City of Cincinnati*, No. 84-1160 (Mar. 25, 1986). In addition, principles of absolute or qualified immunity may shield an individual defendant from liability for damages under 42 U.S.C. 1983.

regime are determined to constitute a taking, Section 1983 provides a remedy in damages against the state, equal to the amount of just compensation constitutionally required for the taking. This includes recompense for the partial or total loss of use of the property between the moment when the taking is determined to have occurred and the moment when the regulation is prospectively invalidated.

In considering whether an invalidated restriction caused a taking while it was temporarily in effect, the factors to be taken into account in a suit under 42 U.S.C. 1983, are, in our view, essentially the same as those that the courts traditionally consider in determining whether a taking has occurred.

This Court has, in past cases, relied upon "*ad hoc*, factual inquiries" (*Kaiser Aetna*, 444 U.S. at 175) into three specific factors of "particular significance" to determine whether "'justice and fairness' require that economic injuries caused by public action be compensated by the government" (*Penn Central*, 438 U.S. at 124). These factors are: (1) "the character of the governmental action" (*ibid.*); (2) "[t]he economic impact of the regulation" on the property (*ibid.*); and (3) the reasonableness of the property owner's "distinct investment-backed expectations" for the use of its property (*id.* at 124-125). See also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Kaiser Aetna*, 444 U.S. at 175. Although these factors have been utilized in the past to determine whether the permanent application of a regulation constitutes a taking, there is no reason why they should not also be applied to ascertain the point at which a temporary deprivation becomes a taking under the Fifth Amendment.

CONCLUSION

The judgment of the court of appeal should be affirmed.

Respectfully submitted.

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AMICUS CURIAE

BRIEF

(6)
No. 85-1199

Supreme Court, U.S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF
GLENDALE, a California Corporation,
Appellant,

v.

COUNTY OF LOS ANGELES, CALIFORNIA,
Appellee.

On Appeal from the Court of Appeal of California,
Second Appellate District,
Division Seven

BRIEF OF THE
NATIONAL ASSOCIATION OF HOME BUILDERS
AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

No. 85-1199

FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF
GLENDALE, a California Corporation,
Appellant,

v.

COUNTY OF LOS ANGELES, CALIFORNIA,
Appellee.

**BRIEF OF THE
NATIONAL ASSOCIATION OF HOME BUILDERS
AS AMICUS CURIAE IN SUPPORT OF APPELLANT**

The National Association of Home Builders has received the parties' written consent to file this brief as *amicus curiae* in support of the appellant and has filed their letters of consent with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The National Association of Home Builders represents 142,000 builder and associate members organized in approximately 800 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Its members include not only people and firms that construct and supply single-

family homes but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.

The California Supreme Court, unlike virtually every other state and federal appellate court that has considered the question, has held that private landowners are not entitled to the just compensation required by the Fifth Amendment, made applicable to the states by the Fourteenth Amendment, where a local governmental body adopts a land use regulation that takes the landowner's property by depriving it of all, or substantially all, use.¹ The existence of the Just Compensation Clause is a shield against oppressive governmental land use regulation and is of obvious importance to the National Association of Home Builders. The availability of compensation for the occasional ordinance that "goes too far"² is critical to the livelihood of private landowners who have lost the beneficial use of their property solely to serve local governmental interests, such as, as in the pres-

¹ *Agins v. City of Tiburon*, 24 Cal.3d 266, 276-77, 157 Cal.Rptr. 372, 598 P.2d 25 (1979) ("*Agins I*"), *aff'd on other grounds*, 447 U.S. 255 (1980) ("*Agins II*"), which was reaffirmed by the California Supreme Court in *Baker v. Burbank-Glendale-Pasadena Airport Authority*, 39 Cal.3d 862, 867 n.4, 218 Cal. Rptr. 293, 705 P.2d 866 (1985).

²

The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922), cited with approval in *MacDonald, Sommer & Frates v. Yolo County*, 106 S.Ct. 2561, 2566 (1986).

ent case, by effectively converting private property into a public flood control channel.

The National Association of Home Builders has been before this Court on the identical issue as an *amicus* or as of counsel to the landowner in *Agins II*, *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), *Williamson County Regional Planning Commission v. Hamilton Bank*, 105 S.Ct. 3108 (1985), and *MacDonald*. It returns to this Court for a resolution of this irrepressible Constitutional issue. Fundamental fairness, case precedent, common sense, and the plain language of the Fifth Amendment all mandate that individual rights in property taken for public use be protected by the payment of *just* compensation.

SUMMARY OF THE ARGUMENT

I. THIS CASE IS RIPE FOR DECISION

The trial court in this case granted the County's motion to strike those portions of the Church's second amended complaint that sought just compensation on the theory that the County's zoning ordinance had taken the Church's property. The trial court, relying on the California Supreme Court's decision in *Agins I*, held that invalidation of the offending ordinance was the only remedy available; just compensation, in the form of money, was not an available remedy in California.

The California Court of Appeal affirmed the trial court on this point.

Thus, given the procedural posture of this case, both the trial court and the Court of Appeal proceeded

on the basis that a taking had occurred with the only issue being the proper remedy.

Implicit in this posture is that no administrative remedies were available to the Church. Both courts were correct in proceeding on this basis because the offending ordinance prohibits all use of the property, and California law prohibits a county from granting a variance authorizing a use or activity not expressly authorized by an applicable zoning ordinance. Thus, even though California has a very strict doctrine of the exhaustion of administrative remedies, the unavailability of a use variance means that the doctrine is inapplicable.

Further, California law holds that every rezoning, no matter how small the parcel affected, is a legislative act. Therefore, the only possible relief available to the Church would have been the repeal or amendment of the offending ordinance, which is not an administrative remedy. California, like most states, does not require that a landowner seek the repeal or amendment of an offending ordinance before seeking judicial relief.

In other words, the issue of the remedy required as a result of the adoption of the offending ordinance was properly before the courts of California and is now properly before this Court.

II. THE CONSTITUTIONALLY MANDATED REMEDY FOR A LAND USE REGULATION THAT TAKES PROPERTY BY GOING TOO FAR IS JUST COMPENSATION

Once there has been a taking, just compensation must be paid. The clear language of the Fifth Amendment, made applicable to the states by the Fourteenth

Amendment, so requires. This Court, numerous lower federal courts, and virtually every state court that has addressed the question have consistently held that compensation, rather than invalidation, is the requisite remedy.

Invalidation is unfair and useless because it cannot repair the harm done. It is an inadequate remedy because, given a court's inability to command a legislative body to allow a certain use on specified property, the injured landowner is required to undergo further proceedings before the very same body that deprived the landowner of his Constitutional rights in the first place.

The California Supreme Court based its inflexible rule of no compensation in *Agins I* on the unsupported fear that a requirement that just compensation be paid when a land use regulation goes too far would have a "chilling effect" on land use planning and zoning. This premise, which requires the individual landowner to bear all of the costs of a land use regulation that takes his property, is flatly contradicted by this Court's decisions and even those of the California Supreme Court in every other area of the law but land use regulation.

ARGUMENT

I. THIS CASE IS RIPE FOR DECISION

Over the last six years this Court has attempted four times to address the question of whether the Constitution mandates the payment of just compensation as a remedy for a land use regulatory taking. None of the infirmities that prevented this Court from reaching the question of the proper remedy after a

taking has occurred are present in this case. The trial court and the Court of Appeal proceeded on the basis that a taking had occurred but still struck those portions of the second amended complaint, which alleged that the Church was entitled to just compensation as a result of the adoption of the offending ordinance that deprived it of the use of its property. Further, unlike the situations presented in *Agins II*, *Williamson Planning Commission*, and *MacDonald*, the Church has no administrative remedies available to it which could in any way alleviate or mitigate the prohibition from granting any sort of a variance that would allow a use not authorized by the ordinance. California Government Code § 65906 (West 1983) states, in pertinent part:

A variance shall not be granted for a parcel of property which authorizes a use or activity which is not otherwise expressly authorized by the zone regulation governing the parcel of property.³

California considers the doctrine of exhaustion of administrative remedies to be jurisdictional in nature. *Metcalf v. County of Los Angeles*, 24 Cal.2d 267, 269, 148 P.2d 645 (1944). But even the courts of California hold that there is no need to exhaust an administrative remedy before applying to the courts for relief "... when the administrative agency cannot grant an adequate remedy, and when the aggrieved party can positively state what the administrative agency's de-

³ Government Code § 65906 is applicable to the County. *Topanga Association for a Scenic Community v. County of Los Angeles*, 11 Cal.3d 506, 511, 113 Cal.Rptr. 836, 522 P.2d 12 (1974).

cision in his particular case would be." *Ogo Associates v. City of Torrance*, 37 Cal.App.3d 830, 834, 112 Cal.Rptr. 761 (1974) [citations omitted.]

The only possible nonjudicial remedy available to the Church was to request amendment or repeal of the offending ordinance. California law treats any rezoning as a legislative, not an administrative, act.

As we shall explain, California precedent has settled the principle that zoning ordinances, whatever the size of the parcel affected, are legislative acts. We find no warrant for departing from that principle.

Arnel Development Co. v. City of Costa Mesa, 28 Cal.3d 511, 514, 169 Cal.Rptr. 904, 620 P.2d 560 (1980).

California does not require that a property owner seek a legislative remedy before applying to a court for relief.

Respondent is not precluded, if he has exhausted the administrative remedy, from challenging the constitutionality of the ordinance.

Dunham v. City of Westminster, 202 Cal.App.2d 245, 250, 20 Cal.Rptr. 772 (1972).⁴

⁴ California's rule of no doctrine of exhaustion of legislative remedies seems to be followed in every state except Illinois.

In no other jurisdiction has it been held that an application for a change of zone and the denial thereof by the legislative body is a condition precedent to bringing an action for judgment declaring the existing zoning classification invalid.

³ Rathkopf & Rathkopf, *The Law of Zoning and Planning*, § 35.02[3] at 35-21-22 (4th ed. 1986).

Finally, under *Agins I* and *Baker*, the Church has no possibility of obtaining just compensation under California law.⁵

Thus, no administrative remedies are available to the Church, and its property has been taken without any possibility of recovering just compensation from the courts of California, making this case ripe for decision by this Court.

II. THE CONSTITUTIONALLY MANDATED REMEDY FOR A LAND USE REGULATION THAT TAKES PROPERTY BY GOING TOO FAR IS JUST COMPENSATION⁶

A. This Court Has Repeatedly Stated That The Payment Of Just Compensation, Rather Than Invalidation Of An Offending Law, Is The Required Remedy Under The Constitution

As recently as last year, this Court unanimously stated that just compensation, rather than invalidation, is the required remedy when otherwise valid regulation takes property.

⁵ Nor is the California Supreme Court likely to change its view on just compensation in the foreseeable future. The Court of Appeals for the Ninth Circuit abstained in *Bank of America National Trust & Savings Association v. Summerland County Water District*, 767 F.2d 544 (9th Cir. 1985), in order to allow the courts of California to rethink their position on just compensation in light of Justice Brennan's dissent in *San Diego Gas & Electric*. The *Bank of America* case was decided on July 26, 1985. Less than two months later, on September 23, the California Supreme Court handed down its decision in *Baker* and reaffirmed its holding in *Agins I*.

⁶ For a detailed and incisive discussion of the policy and precedent underlying the Constitutional mandate, see Brief for Appellant at 17-26 and Reply Brief for Appellant at 17-20 and 22-29 in *MacDonald*.

We have held that in general, "[e]quitable relief is not available to enjoin an alleged taking of private property for public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to a taking." *Ruckelshaus v. Monsanto Co.*, 467 U.S. --, 104 S.Ct. 2862, 2880, 81 L.Ed.2d 850 (1984) (footnote omitted). This maxim rests on the principle that so long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional. *Williamson County*, *supra* at --, 105 S.Ct. at --.

United States v. Riverside Bayview Homes, Inc., 106 S.Ct. 455, 459-60 (1985).

Riverside Bayview Homes does not stand alone; it is only the latest in a long line of cases.⁷ These cases do nothing more than reflect the idea that the Fifth Amendment is designed to ensure that those who are injured excessively by public actions are reimbursed by the public at large.

The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some

⁷ See, e.g., *Hurley v. Kincaid*, 285 U.S. 95 (1932); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950); *Dugan v. Rank*, 372 U.S. 609 (1963); *City of Fresno v. California*, 372 U.S. 627 (1963); *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) (majority opinion as well as dissent by Justice Rehnquist, joined by Chief Justice Burger and Justice Stevens).

people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Armstrong v. United States, 364 U.S. 40, 49 (1960). Accord, *Connolly v. Pension Benefit Guaranty Corp.*, 106 S.Ct. 1018, 1027 (1986); *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945).⁸

The self-executing nature of the Just Compensation Clause was explicitly stated in Justice Brennan's dissent in *San Diego Gas and Electric*:

This Court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: once

⁸ While the taking of land by physical invasion has also been found through, e.g., flooding (*Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. (13 Wall.) 166 (1871)), airplane overflights (*Griggs v. Allegheny County*, 369 U.S. 84 (1962)), public access to a private pond (*Kaiser Aetna v. United States*, 444 U.S. 164 (1979)), and cable television attachments (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)), this Court has also emphasized that:

We have frequently recognized that a radical curtailment of a landowner's freedom to make use of or ability to derive income from his land may give rise to a taking within the meaning of the Fifth Amendment, even if the Government has not physically intruded upon the premises or acquired a legal interest in the property.

Kirby Forest Industries, Inc. v. United States, 104 S.Ct. 2187, 2196 (1984) [emphasis added].

As Justice Stewart once put it, "the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does." *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (concurring opinion) [emphasis in the original].

there is a "taking," compensation *must* be awarded.

450 U.S. at 654 [emphasis in the original].⁹

Justice White's dissent in *MacDonald* reiterated Justice Brennan's acknowledgement that a compensable taking is effected when an individual is deprived of "all or most" of his interest in property.¹⁰

B. The Preponderance Of Federal And State Courts Agree With This Court That Just Compensation Is The Constitutionally Mandated Remedy For A Regulatory Taking

This Court's teachings have not gone unheeded. With the exception of the First Circuit¹¹ every United States Court of Appeals that has addressed the question has indicated that just compensation is the Constitutionally mandated remedy for a regulatory taking.¹²

⁹ Joined by Justices Stewart, Marshall and Powell. See Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 Rutgers L.J. 15 (1983); Kratovil, *Eminent Domain Revisited and Some Land Use Problems*, 34 DePaul L. Rev. 587 (1985).

¹⁰ 106 S.Ct. at 2573 (joined by Chief Justice Burger and Justices Powell and Rehnquist). Regarding the constitutional soundness of Justice Brennan's dissent, see L. Tribe, *Constitutional Choices* 385-86 n.23 (1985); Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 Mich. L. Rev. 1, 193 (1984).

¹¹ See, e.g., *Alton Land Trust v. Town of Alton*, 745 F.2d 730 (1st Cir. 1984).

¹² See, e.g., *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986); *Rogin v. Bensalem Township*, 616 F.2d 680 (3rd Cir. 1980), cert. denied, 450 U.S. 1029 (1981);

No state high court has followed California's rule of noncompensation. To the contrary, the courts agree with this Court and hold that just compensation is the constitutionally mandated remedy when a land use regulation effects a taking.¹³

Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983); *Shelton v. City of College Station*, 754 F.2d 1251 (5th Cir. 1985), *rev'd on other grounds*, 780 F.2d 475 (5th Cir.), *cert. denied*, 106 S.Ct. 3276 (1986); *Hamilton Bank v. Williamson County Regional Planning Commission*, 729 F.2d 402 (6th Cir. 1984), *rev'd on other grounds*, 105 S.Ct. 3108 (1985); *Barbian v. Panagis*, 694 F.2d 476 (7th Cir. 1982); *Littlefield v. City of Aston*, 785 F.2d 596 (8th Cir. 1986); *MacLeod v. County of Santa Clara*, 749 F.2d 541 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 2705 (1985); *Fountain v. Metropolitan Atlanta Rapid Transit Authority*, 678 F.2d 1038 (11th Cir. 1982). Additional decisions are cited in Bley, *Use of the Civil Rights Acts to Recover Damages for Undue Interference With the Use of Land*, in Southwestern Legal Foundation, Proceedings of the Institute on Planning, Zoning, and Eminent Domain §7.02[1][b] at 7-5 n.4 (1985).

¹³ See, e.g., *Pioneer Sand & Gravel v. Municipality of Anchorage*, 627 P.2d 651 (Alaska 1981); *Corrigan v. City of Scottsdale*, 720 P.2d 513 (Ariz. 1986); *Harris Trust & Savings Bank v. Duggan*, 95 Ill.2d 516, 449 N.E.2d 69 (1983); *Osborn v. City of Cedar Rapids*, 324 N.W.2d 471 (Iowa 1982); *Ventures in Property I v. City of Wichita*, 225 Kan. 698, 594 P.2d 671 (1979); *Pratt v. State*, 309 N.W.2d 767 (Minn. 1981); *Knight v. City of Billings*, 197 Mont. 165, 642 P.2d 141 (1982); *Burrows v. City of Keene*, 121 N.H. 590, 432 A.2d 15 (1981); *Rippley v. City of Lincoln*, 330 N.W.2d 505 (N.D. 1983); *Suess Builders Co. v. City of Beaverton*, 294 Or. 254, 656 P.2d 306 (1982); *Annicelli v. Town of South Kingston*, 463 A.2d 133 (R.I. 1983); *Zinn v. State*, 112 Wis.2d 417, 334 N.W.2d 67 (1983). These cases continue a trend that predates *Agins I*. See, e.g., *Brecciaroli v. Connecticut Commissioner of Environmental Protection*, 168 Conn. 349, 362 A.2d 948 (1975); *Washington Market Enterprises, Inc. v. City of Trenton*, 68 N.J. 107, 343 A.2d 408 (1975); *Village of Wiloughby Hills v. Corrigan*, 29 Ohio St.2d 39, 278 N.E.2d 658,

California's absolutist rule of noncompensation not only violates the words and spirit of the Constitution but also clashes with federal and state case law throughout the nation.

C. Invalidation As The Sole Remedy For A Land Use Regulation That Effects A Taking Is An Ineffective Remedy

Many commentators have noted how easily the "right" to invalidation can be frustrated in the land use context:

[I]nvalidation does not mean that the landowner can proceed to develop his land. In fact, it often means just the opposite, since the landowner then faces a hostile local government, which not only has an arsenal of other controls with which to stymie the landowner, but also may have enough malevolent creativity to enact a regulation only slightly less restrictive than the one invalidated to start the litigation game all over again.¹⁴

As Justice Brennan observed in his dissent in *San Diego Gas and Electric*, some prominent local regulators, particularly in California, treat invalidation with disdain.¹⁵

cert. denied sub nom. Chongris v. Corrigan, 409 U.S. 919 (1972); *City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978).

¹⁴ Kmiec, *Regulatory Takings: The Supreme Court Runs Out of Gas in San Diego*, 57 Ind. L.J. 45, 51 (1982). Accord, Comment, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 U.C.L.A. L. Rev. 711, 732-34 (1982); Hagman, Larsen & Martin, *California Zoning Practice* § 12.2 at 496 (1969).

¹⁵ 450 U.S. at 655-56 n.22, quoting James Longtin, a prominent California City Attorney and author of *California Land*

The cities and counties of California are not alone in attempting to frustrate a judgment of invalidation. For example, in *Township of Willistown v. Chesterdale Farms, Inc.*, 462 Pa. 445, 341 A.2d 466 (1975), the court dealt with a situation where a town had originally zoned itself so as to prohibit apartment buildings entirely. After a decision by the Pennsylvania Supreme Court holding a similar total prohibition in another town invalid, the town rezoned itself so as to allow apartment buildings on 80 of its 11,600 acres. Notwithstanding the Pennsylvania Supreme Court's previous ruling, the town's token response forced the developer to go to court in order to obtain a declaration that the rezoning was invalid.

Nor is this a new problem. In *Henle v. City of Euclid*, 97 Ohio App. 258, 125 N.E.2d 355, *app. dismissed*, 162 Ohio St. 280, 122 N.E.2d 792 (1954), and its follow-on, *State ex rel. Sun Oil Co. v. City of Euclid*, 164 Ohio St. 265, 130 N.E.2d 336 (1955), a city used its zoning powers to prevent development of property that was to be acquired at some later, indefinite time for a freeway. The same day that the Ohio Supreme Court handed down its first decision, holding the action to be invalid, the city, again invalidly, passed an appropriation resolution indicating its intent to purchase the property. On the basis of this resolution the city denied the property owner a building permit. As a result, the property owner was forced, at its own expense and waste of time, to go

Use Regulation (1977), from Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation)*, in 38B NIMLO Municipal Law Review 192-93 (1975).

to the Ohio Supreme Court a second time to obtain the relief due it.

Not every landowner has the staying power of the Sun Oil Company. More than one landowner has lost his property while waiting for the courts to determine the validity of a zoning ordinance.¹⁶

For one who stands in the shoes of a property owner who has lost his land, "it is damages or nothing."¹⁷ As Professor Tribe put it, the compensation requirement is at least "an attempt to limit arbitrary sacrifice of the few to the many." L. Tribe, *American Constitutional Law* § 9-4 (1978).

D. Requiring A Governmental Agency To Pay Just Compensation After It Has Taken Property Will Not Have A "Chilling Effect" On The Agency's Ability To Govern Nor Is This Relevant

The California Supreme Court in *Agins I* supported its decision to prohibit the payment of just compensation as the remedy for a regulatory taking by presupposing a "chilling effect" on the ability of cities and counties to govern. 24 Cal.3d at 276.

This Court has consistently rejected the Constitutional relevance of such an argument. For example:

First, as an empirical matter, it is questionable whether the hazard of municipal loss will

¹⁶ See, e.g., *Jacobson v. Tahoe Regional Planning Agency*, 556 F.2d 1353, 1366-67 (9th Cir. 1978); *County of Los Angeles v. Berk*, 26 Cal.3d 201, 206 n.3, 161 Cal.Rptr. 742, 605 P.2d 381 (1980); *Klopping v. City of Whittier*, 8 Cal.3d 39, 58, 104 Cal.Rptr. 1, 500 P.2d 1345 (1972).

¹⁷ *Bivens v. Six Unnamed Agents*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring). See generally ALI Model Land Development Code 155-56, 440 (1976).

deter a public officer from the conscientious exercise of his duties;¹⁸ city officials routinely make decisions that either require a large expenditure of municipal funds or involve a substantial risk of depleting the public fisc. More important, though, is the realization that consideration of the *municipality's* liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decision-maker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury.

Owen v. City of Independence, 445 U.S. 622, 656 (1980) [citation omitted; emphasis in the original].

¹⁸ In fact, even though inverse condemnation actions for land use regulation takings have been brought throughout the United States since the early 1970's, see, e.g., *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), neither the appellees nor their amici in *Agins II*, *San Diego Gas & Electric*, *Williamson Planning Comm'n*, and *MacDonald* could point to a *single* excessive award. A regulatory taking is much harder to prove than, say, the commission of a tort. Further, builders are practical; they are loathe to sue local governments over development decisions, particularly for damages, because, unlike most citizens who rarely require individualized approvals, such as subdivision maps or conditional use permits, builders know they must reappear before the same agencies seeking the approval of other developments in the future. Finally, land use planning has been as vigorous as ever - if not more so - over the last fifteen years, notwithstanding the availability of inverse condemnation actions in both state and federal court.

California has taken the same position as this Court in every field of law except for regulatory takings. For example:

As a threshold matter, we consider it unlikely that the possibility of government liability will be a serious deterrent to the fearless exercise of judgment by the employee. In any event, however, to the extent that such a deterrent effect takes hold, it may be wholesome. An employee in a private enterprise naturally gives some consideration to the potential liability of his employer, and this attention unquestionably promotes careful work; the potential liability of a governmental entity, to the extent that it effects primary conduct at all, will similarly influence public employees.

Johnson v. State, 69 Cal.2d 782, 792-93, 73 Cal.Rptr. 240, 447 P.2d 352 (1968) [citation and footnote omitted].¹⁹

Moreover, California's solicitude for landowners who suffer physical damage to their real property as a result of governmental action is unbounded.²⁰ For in-

¹⁹ This section was quoted by this Court in *Owen*, 445 U.S. at 656 n.41.

²⁰ Yet, in reality, no practical or Constitutional difference exists between depriving an individual of substantially all use of his property by seizing it physically or by preventing it by regulation.

The only substantial difference in such case, between restriction and actual taking, is that the restriction leaves the owner subject to the burden of payment of taxation, while outright confiscation would relieve him

stance, the California Supreme Court has held that the Just Compensation Clause of the California Constitution is self-executing. *Rose v. State*, 19 Cal.2d 713, 123 P.2d 505 (1942). It has also held that an action in inverse condemnation will lie against an airport authority lacking the power of eminent domain when injury to private property is caused by the noise resulting from aircraft taking off and landing at the authority's airport. *Baker*, 39 Cal.3d at 866-67.

Finally, the courts of California have gone so far as to hold that:

... any actual physical injury to real property proximately caused by a public improvement as deliberately designed and constructed is compensable under article I, section 19 of the California Constitution whether or not the injury was foreseeable.

Aetna Life & Casualty Co. v. City of Los Angeles, 170 Cal.App.3d 865, 873, 216 Cal.Rptr. 831 (1985) (damages resulting from sparks emanating from power lines maintained by the city) [emphasis in the original].

In view of this Court's acute understanding that "[p]roperty does not have rights. People have rights."²¹, it is impossible to reconcile the California

of that burden.

Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 232, 15 N.E.2d 587 (1938).

See generally L. Tribe, *American Constitutional Law* § 9-3 (1978); Michelman, *Property as a Constitutional Right*, 38 Wash. & Lee L. Rev. 1097 (1981).

²¹ *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

Supreme Court's rule of law allowing a landowner to recover damages in inverse condemnation for the loss in value caused by odors emanating from a nearby sewage treatment plant²² or from noises resulting from low flying aircraft²³ but not allowing recovery when the loss in value is due, as here, to a land use regulation depriving the landowner's property of reasonably beneficial use.

CONCLUSION

The severe and singular approach used by the courts of California flies in the face of the Constitution and this Court's opinions interpreting it. For the sake of Constitutional uniformity nationwide and because of the Fifth Amendment's principle of fundamental fairness, this Court should hold that the Constitutionally mandated remedy for a land use regulation that effects a taking of an individual's property is the payment of just compensation based upon a trial court's factual determination of the extent and value of the property interest taken.

Dated: September 4, 1986

²² *Varjabedian v. City of Madera*, 20 Cal.3d 285, 296-99, 142 Cal.Rptr. 429, 572 P.2d 43 (1977).

²³ *Baker*, *supra*.

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AMICUS CURIAE

BRIEF

No. 85-1199 (2)

SEP 8 1986

U.S. COURT OF APPEALS, 9TH CIR.

In The
Supreme Court of the United States
October Term, 1986

FIRST ENGLISH EVANGELICAL LUTHERAN
CHURCH OF GLENDALE, INC.,

Appellant,

v.

COUNTY OF LOS ANGELES,

Appellee.

On Appeal from the California Court
of Appeal, Second Appellate District

**~~MOTION OF~~ PACIFIC LEGAL FOUNDATION
AND DONALD AND BONNIE AGINS
FOR LEAVE TO FILE A BRIEF AMICUS CURIAE,
AND BRIEF AMICUS CURIAE IN SUPPORT
OF APPELLANT**

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No. 85-1199

In The
Supreme Court of the United States
October Term, 1986

FIRST ENGLISH EVANGELICAL LUTHERAN
CHURCH OF GLENDALE, INC.,

Appellant,

v.

COUNTY OF LOS ANGELES,

Appellee.

On Appeal from the California Court
of Appeal, Second Appellate District

**MOTION OF PACIFIC LEGAL FOUNDATION
AND DONALD AND BONNIE AGINS
FOR LEAVE TO FILE A BRIEF AMICUS CURIAE**

Pursuant to Supreme Court Rule Nos. 36.3 and 42.2(b), Pacific Legal Foundation and Donald and Bonnie Agins respectfully move this Court for leave to file the attached amicus curiae brief in support of appellant, First English Evangelical Lutheran Church of Glendale. Counsel for both parties have given their consent to the filing of this brief by Pacific Legal Foundation. Copies of the letters

of consent have been lodged with the clerk of this Court. However, subsequent to the mailing of consent requests, Donald and Bonnie Agins asked to have their names added to the brief. This motion seeks leave to file the attached brief amicus curiae on their behalf as well.

Donald and Bonnie Agins are the owners of five acres in the City of Tiburon. They were the respondents in *Agins v. City of Tiburon*, 24 Cal. 3d 266 (1979), *aff'd*, 447 U.S. 255 (1980), the case wherein the California Supreme Court announced that a monetary remedy would no longer be recognized in California for a regulatory "taking." The Agins have been trying to get governmental permission to develop their land ever since this Court ruled in 1980 that their case was not ripe. In October, 1985, the Tiburon City Council adopted a city-wide building moratorium banning construction by the Agins and other Tiburon property owners. Under the rule announced by the California Supreme Court in the *Agins* case there is no monetary remedy in California for such a deprivation of use. A decision in the case at bar reversing that rule will assist the Agins.

Amici believe that this case does not involve any of the procedural obstacles which have prevented this Court in past cases from reaching the question of whether monetary compensation is available when it can be shown that a regulation effects a "taking." Amici submit that this point should be thoroughly briefed because, if the Court finds it cannot reach the merits in this case, there may never be a case where the merits can be reached. The California rule against monetary compensation will be carved in stone.

Amici also believe this Court would benefit from additional briefing of the policies in support of a compensation remedy. The policies opposing compensation, recited by the California Supreme Court in *Agins*, are in large part illusory, and where not illusory are outweighed by the policies favoring compensation and the need to protect constitutional rights.

For the foregoing reasons, Pacific Legal Foundation and Donald and Bonnie Agins request that their motion to file the attached amicus curiae brief be granted.

DATED: August, 1986.

Respectfully submitted,

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No. 85-1199

In The
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 October Term, 1986

FIRST ENGLISH EVANGELICAL LUTHERAN
 CHURCH OF GLENDALE, INC.,

Appellant,

v.

COUNTY OF LOS ANGELES,

Appellee.

On Appeal from the California Court
 of Appeal, Second Appellate District

**BRIEF AMICUS CURIAE IN SUPPORT
 OF APPELLANT**

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation respectfully submits this brief amicus curiae on behalf of itself and Donald and Bonnie Agins in support of appellant.

INTEREST OF AMICUS

Pacific Legal Foundation is a nonprofit, tax-exempt corporation, incorporated under the laws of California for

the purpose of participating in litigation affecting public policy. The Foundation has over 19,000 supporters and contributors throughout the United States, a great many of whom own property in California and will therefore benefit from a decision in favor of appellants in this case. An independent Board of Trustees authorizes Foundation participation in a case only when it concludes that Pacific Legal Foundation's position has broad public support. The Board of Trustees has authorized the filing of this brief.

Donald and Bonnie Agins are the owners of five acres in the City of Tiburon. They were the respondents in *Agins v. City of Tiburon*, 24 Cal. 3d 266 (1979), *aff'd*, 447 U.S. 255 (1980), the case wherein the California Supreme Court announced that a monetary remedy would no longer be recognized in California for a regulatory "taking." The Agins have been trying to get governmental permission to develop their land ever since this Court ruled in 1980 that their case was not ripe. Pursuant to this Court's finding that the Agins could build up to five houses on their property, the Agins went back to the Tiburon City Council and applied for permission to subdivide their parcel into five buildable lots. The city held more than two years of public hearings in order to decide that it would permit only three lots. As conditions of approval the city required dedications of open space, improvement and dedication of a hiking trail, the construction of an off-site road to the property, an environmental impact report, a traffic study, a soils study, and the payment of various in lieu fees, impact fees, inspection fees, and utility connection fees. The Agins estimate that they spent approximately \$560,000 just obtaining approval

of the three lots. The Agins finished making the improvements required by the city in August, 1985. A few weeks later, in October, 1985, the city council adopted a city-wide building moratorium temporarily banning construction by the Agins and other Tiburon property owners. The moratorium has been extended by initiative until at least April, 1988, with a provision allowing an indefinite extension thereafter. Thus, after expending all these years of time and physically and emotionally draining effort, and paying over one-half million dollars in fees and costs, the Agins now sit unable to use their property and uncertain as to when or if they will be allowed to build their home. Under the rule announced by the California Supreme Court in the *Agins* case there is no monetary remedy in California for such a deprivation of use. The Agins believe this rule has created an incentive for local governments in California to disregard the private property rights of California landowners. The Agins can be put through extreme anguish and expense and then left in limbo because there is no cost to the city for acting in such an unconscionable manner. A decision by this Court overruling the California Supreme Court's holding in *Agins* is necessary, or California property owners such as the Agins will be left with no speedy and adequate recourse for land use regulations which repeatedly deny reasonable use year after year.

The public policy perspectives of these amici curiae in support of private property rights will help provide this Court with a more complete briefing of the interests at stake in the instant litigation.

OPINIONS BELOW

The opinion of the California Court of Appeal was not published. It is attached to appellant's jurisdictional statement as Appendix A (Appellant's Appendix A).

STATEMENT OF THE CASE

First English Evangelical Lutheran Church of Glendale owns 21 acres of land in the mountains of the Angeles National Forest, north of the City of Los Angeles. For 20 years the church operated a camp called "Lutherglen" on its property. A dining hall, bunkhouses, and an outdoor chapel had been constructed there by church volunteers. Lutherglen was used for weekend retreats and summer camp by church members, and as a recreational area for handicapped children of all denominations.

Mill Creek runs through the church's property. In the winter of 1977, a forest fire destroyed a great deal of the vegetation on national Forest Service land upstream from the church's property, creating a potential flood hazard. The fire did not occur on the church's property and was not caused by the church. In early 1978, a storm brought heavy rainfall which caused a flood that destroyed the camp.

After the flood, the county adopted an ordinance permanently prohibiting any construction or reconstruction in that area. The church filed suit against the county including, among other things, a cause of action for inverse condemnation. The inverse condemnation claim

alleged that the county's ordinance prohibited all viable economic use of the church's property. The ordinance thus resulted in a "taking," the church alleged, for which the church should be compensated.

Prior to trial, the county made a motion to strike the inverse condemnation cause of action. The county argued that such a cause of action could not be maintained in California since *Agins v. City of Tiburon*, 24 Cal. 3d 266, disallowed compensation for regulatory "takings." The trial court agreed, and struck the cause of action. The Court of Appeal affirmed the trial court's dismissal of the inverse condemnation claim. The Court of Appeal wrote:

"We conclude that because the United States Supreme Court has not yet ruled on the question of whether a state may constitutionally limit the remedy for a taking to nonmonetary relief, this court is obligated to follow *Agins*." Appellant's Appendix A at 16.

It is this summary dismissal of a claim to constitutional protections which amici wish to address, because it "flatly contradicts clear precedents of this Court." *San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621, 647 (1981) (Brennan, J., dissenting).

SUMMARY OF THE ARGUMENT

Under California rules of civil procedure, a motion to strike a cause of action asserts that the cause of action is not in conformity with state law. By ruling that it was

proper to strike the church's claim for monetary compensation based on an alleged "taking," the California Court of Appeal has presented this Court a unique opportunity to address, in isolation, the recurring question of whether monetary compensation is an appropriate remedy for a regulatory "taking." Compensation is not only mandated by the constitution, it is the preferred remedy because it is an action at law and it provides for a speedy and adequate resolution of the dispute. Moreover, the compensation remedy is the only device to provide reasonable assurance that local governments will give due consideration to protected property interests when making land use regulation decisions.

ARGUMENT

I

THIS CASE PRESENTS THIS COURT WITH A FINAL DECISION THAT CALIFORNIA COURTS WILL NOT AWARD COMPENSATION FOR A TAKING OF PROPERTY BY A LOCAL GOVERNMENT LAND USE REGULATION

A. Issue Presented

The trial court sustained, and the Court of Appeal affirmed, the county's motion to strike the church's inverse condemnation claim. Under California rules of civil procedure, a motion to strike is different from a demurrer.

A demurrer asserts that "[t]he pleading does not state facts *sufficient* to constitute a cause of action." Cal. Code of Civ. Proc. § 430.10(e) (emphasis added). In

other words, a demurrer admits that a cause of action *could* be pled, but avers that the instant complaint does not state enough facts to plead one. Since more facts could perhaps be pled, and the defect thus cured, a demurrer is properly granted with leave to amend. *Winn v. McCulloch Corp.*, 60 Cal. App. 3d 663, 672 (1976); *Greenberg v. Equitable Life Assurance Society of the United States*, 34 Cal. App. 3d 994, 998 (1973).

A motion to strike, on the other hand, asserts that the cause of action does not exist. California's motion to strike statute, Code of Civil Procedure § 436, states in pertinent part:

"The court may, upon a motion [to strike]:

. . . .

"(b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state"

The motion to strike is used in place of a demurrer when the defect is not curable by amendment. *B.F.G. Builders v. Weisner & Coover Company*, 206 Cal. App. 2d 752, 758-59 (1962); *Warren v. Atchison, Topeka and Santa Fe Railway Company*, 19 Cal. App. 3d 24, 41 (1971). Simply put, a demurrer says that a cause of action *has* not been stated; a motion to strike says that a cause of action *cannot* be stated.

The procedural history of this case thus isolates for this Court's review the single question: Is there a cause of action for monetary compensation if it can be shown that a governmental regulation has taken private property for public use.

B. Issues Not Presented

This case does not involve ripeness. In *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621, and *MacDonald, Sommer & Frates v. County of Yolo*, — U.S. —, 54 U.S.L.W. 4782 (1986), this Court was prevented from reaching the constitutionality of California's rule against monetary compensation. In each of those cases, this Court faced a finding of the California courts that as a matter of state procedure, it was too soon to tell whether a "taking" had occurred. In *Agins*, the lower court found that as many as five units could be built on the five acres owned by amici herein, if they would apply for permission to build them. *Agins*, 447 U.S. at 260. In *San Diego*, the lower court found that an insufficient factual record had been assembled at trial and therefore a final judgment could not be rendered. 450 U.S. at 631-32. In *MacDonald*, the lower court found that some less intensive use might be approved by the county, if the developer would be willing to reapply with an alternative proposal. 54 U.S.L.W. at 4783.

Thus, in each of the above cases, the California courts had held out the possibility to the plaintiffs that they could return to court another day if necessary to present evidence to show that a "taking" had occurred. In the case at bar, however, the lower courts by striking the church's cause of action altogether have said in effect, "go away and don't come back." Even assuming that there are additional procedures the church might exhaust, exhausting them will not allow the church back into court. The Court of Appeal ruled that the church is not allowed

to bring a claim for monetary compensation. This judgment is final unless reversed by this Court.

This case also does not involve the factual question of whether or not a "taking" has occurred. Because the church has not been given the opportunity to present its evidence, there is no record from which this Court could make the "'ad hoc, factual' inquiry" necessary to determine whether a "taking" has occurred. *Ruckelshaus v. Monsanto Company*, 467 U.S. 986, 1005 (1984); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

Even if the county argues that it had a legitimate public safety rationale for enacting the ordinance, the church obviously believes nonetheless that it is bearing more than its share of a burden which, "in all fairness and justice, should be borne by the public as a whole." See *Armstrong v. United States*, 364 U.S. 40, 49 (1960). *Kaiser Aetna*, 444 U.S. at 175. The fact that there may exist a legitimate public safety rationale means only that the ordinance is a valid exercise of the police power and that, to the extent it takes private property, it does so for a public purpose. See *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 239-43 (1984); *Berman v. Parker*, 348 U.S. 26, 31-32 (1954). It is a separate question (which cannot be answered without a factual record) whether application of the ordinance to the church would result in a compensable "taking." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982); *United States v. Security Industrial Bank*, 459 U.S. 70, 74-75 (1982). The church has alleged that it can prove the ordinance extinguishes all viable economic use of its property. The church may also be able to show that the county had other less intrusive

means of curing the flood problem, such as replanting the burned vegetation, dredging Mill Creek, constructing a dam, or other alternatives not selected because they would cost more than simply rezoning the church's downstream property.

Since it is impossible to know now what facts a trial might produce, this Court cannot address the factual question of whether or not a "taking" has occurred. This Court should rule, however, that the church is entitled to a trial and to an opportunity to obtain monetary compensation if the church can carry its burden to establish a "taking" has occurred.

II

MONETARY COMPENSATION IS THE PREFERRED REMEDY FOR A REGULATORY "TAKING"

The decisions of this Court not only allowing, but preferring, compensation are numerous. In *Hurley v. Kincaid*, 285 U.S. 95 (1932), Kincaid brought suit against the Secretary of War to enjoin a flood control project which at times would cause floodwaters to enter his farm. This Court held:

"For even if the defendants are acting illegally, under the Act, in threatening to proceed without first acquiring flowage rights over the complainant's lands, the illegality . . . is confined to the failure to compensate him for the taking, and affords no basis for an injunction if such compensation may be procured in an action at law." *Id.* at 104.

In *Dugan v. Rank*, 372 U.S. 609 (1963), riparian landowners brought suit against Bureau of Reclamation

officials to enjoin the diversion of water from the San Joaquin River. This Court stated:

"Therefore, when the Government acted here 'with the purpose and effect of subordinating' the respondents' water rights to the Project's uses . . . '[there was] the imposition of such a servitude [as] would constitute an appropriation of property for which compensation should be made.' [Citations omitted.]

"In an appropriate proceeding there would be a determination of not only the extent of such a servitude but the value thereof based upon the difference between the value of respondents' property before and after the taking. Rather than a stoppage of the government project, this is the avenue of redress open to respondents." *Id.* at 625-26.

Recently, in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, Monsanto Company brought suit against the administrator of the Environmental Protection Agency (EPA) to enjoin the EPA's disclosure of certain trade secrets related to new Monsanto products under the disclosure provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Monsanto argued that application of the FIFRA provisions to it would result in a "taking" if not enjoined. This Court held:

"Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." 467 U.S. at 1016 (footnote omitted).

Thus, from the governmental defendant's perspective compensation is the preferred remedy because the alternative, an injunction, can have the effect of setting aside a major government action due to a minor, resulting "taking."

Compensation is preferred over equitable relief from the plaintiff landowner's perspective as well. Equitable relief is generally available only when no speedy and adequate remedy is available at law. *Moore v. Sims*, 442 U.S. 415, 425 (1979); *Parker v. Winnipiseogee Lake Cotton & Woolen Company*, 67 U.S. 545, 553 (1862). Thus, equity is granted to provide a speedy and adequate remedy. The California rule adopted in *Agins* has turned this maxim of equity on its head. Monetary compensation is a speedy and adequate remedy at law when regulation takes private property rights. It is speedy because it brings an end to the litigation and it is adequate because it appraises what has been taken and compensates the owner for it. Equitable relief in the form of a writ of mandate setting aside the complained of governmental decision is neither speedy nor adequate. It does nothing to compensate the owner for the temporary deprivation of use. It also does nothing to prevent the particular governmental entity from subsequently imposing on the owner equally or more harsh regulations which are just slightly different from the ones last reviewed by the courts. The *Agins* rule thus engenders a multiplicity of suits and ultimately induces owners to compromise constitutional rights in order to cut their losses.

III

CLEAR STANDARDS FOR THE JUST COMPENSATION OF INDIVIDUALS WHOSE PROPERTY HAS BEEN TAKEN WILL AID, NOT DESTROY, LOCAL GOVERNMENT DISCRETION IN LAND USE MATTERS

Although "various policy considerations," see *Agins*, 24 Cal. 3d at 275-76, have been argued against monetary

compensation as an appropriate remedy when property is taken by an exercise of the police power, these policy considerations do not justify the circumvention of a constitutionally guaranteed right. Essentially, these "policy considerations" concern preserving local governments' discretion in the area of land use planning and protecting local governments' treasuries

Similar policy considerations were rejected in *Owen v. City of Independence*, 445 U.S. 622 (1980), in which this Court held that municipalities have no immunity from liability under 42 U.S.C. § 1983 and that they cannot assert the good faith of their officers as a defense to such liability. In *Owen* this Court stated:

"First, as an empirical matter, it is questionable whether the hazard of municipal loss will deter a public officer from the conscientious exercise of his duties; city officials routinely make decisions that either require a large expenditure of municipal funds or involve a substantial risk of depleting the public fisc. [Citation omitted.] More important, though, is the realization that consideration of the *municipality's* liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury. As one commentator aptly put it: 'Whatever other concerns should shape a particular official's actions, certainly one of them should be the constitutional rights of individuals who will be affected by his action.'" *Id.* at 656 (emphasis in original).

Those who oppose awarding monetary damages for regulatory "takings" insist that holding municipalities

accountable for constitutional violations will deprive local governments of discretion in land use matters.

These arguments refuse to recognize that the guiding principle of just compensation is merely to put the property owner in as good a position as he or she would have occupied had his or her property not been taken. *United States v. Virginia Electric and Power Co.*, 365 U.S. 624, 633 (1961). In most situations this would mean payment of the full monetary equivalent of the property interest taken. See *United States v. Reynolds*, 397 U.S. 1416 (1970). If the owner has not been deprived of the permanent use of his or her property, the restoration to the owner of the ability to make reasonable use of the property leaves only the need for the payment of damages for the period during which the owner was deprived of the use of the property.

Such a result does not disable local governments from maintaining their discretion in deciding local land use matters. If the government entity imposing the regulation determines that continuing the regulation, despite the fact that it works a "taking," serves the best interest of the community, it can formalize the condemnation by simply confessing judgment and paying the owner the full value of the property. *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. at 659-60 (Brennan, J., dissenting). Only the compensation remedy provides for the balance of interests which ensures that local governments will exercise discretion to determine the best interests of their communities with due respect for the Fifth Amendment protection of reasonable and legitimate expectations associated with personal rights in the use and enjoyment of private property.

CONCLUSION

This case presents a sterilized question of law: Is a monetary remedy available if it can be shown that land use regulation has effected a "taking"? The lower courts have not suggested that the church's cause of action is premature; they have instead held that a claim for monetary compensation cannot be stated. Moreover, there has been no opportunity to develop a factual record. Thus, this Court can decide the question of remedies and remand the case for further proceedings to determine whether a "taking" has occurred. On the isolated question of remedies, the decisions of this Court are clear that compensation is available, and is the preferred remedy. Amici urge this Court to restore the constitutional guaranty of just compensation to the people of California.

DATED: August, 1986.

Of Counsel

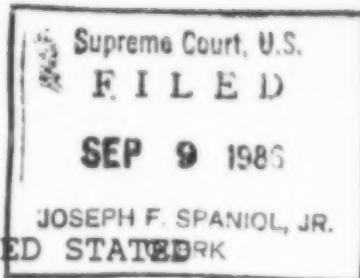
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BRIEF



IN THE (9)

SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 85-1199

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CHURCH OF GLENDALE
A California Corporation,

Appellant

v.

THE COUNTY OF LOS ANGELES, CALIFORNIA,

Appellee

ON APPEAL FROM THE CALIFORNIA COURT OF
APPEALS

BRIEF OF AMERICAN COLLEGE OF REAL
ESTATE LAWYERS, AS AMICUS CURIAE IN SUPPORT
OF APPELLANT

Amicus Curiae has received the parties' oral consent to file this Brief and has confirmed the consent in writing by letters dated August 6, 1986, filed with the Clerk of the Court.

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IN
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986
No. 85-1199

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CHURCH OF GLENDALE
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QUESTION PRESENTED

Whether a valid land use regulation can effect a taking of private property for which just compensation must be paid under the Fifth Amendment of the United States Constitution.

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INTEREST OF AMICUS CURIAE

The purpose of the American College of Real Estate Lawyers, as stated in its Charter, is to

"gather together lawyers distinguished for their skill, experience and high standards of professional and ethical conduct in the practice of real estate law who will contribute . . . to the best interests of the Bar and general public, . . . to speak upon matters of interest and importance to real estate law and practice. . . ."

Accordingly, the College is interested in the outcome of this case because it concerns a fundamental constitutional question about private real estate property rights affected by government land use regulations. That question is whether a land use regulation, valid on its face, can effect a Fifth Amendment taking for which just compensation should be available to the landowner. Because of the

profound constitutional issue involved, as well as the important practical ramifications for those persons particularly concerned with real estate law, the College submits its brief as amicus curiae in support of the Appellant.

The College has take the same position as amicus curiae in MacDonald, Sommer and Frates v. County of Yolo, 477 U.S. ___, No. 84-2015 (June 25, 1986), and Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. ___, 105 S.Ct. 3108 (1985), urging the Court to decide that landowners are entitled to just compensation when land use regulations deprive them of the economically viable use of their land, and that invalidation of the regulation cannot be the exclusive remedy.

PRELIMINARY STATEMENT

The issue before the Court is whether a municipality is required to compensate a landowner whose property has been "taken" de facto by operation of a county ordinance prohibiting any construction on the owner's land.* This issue of the constitutional necessity of a monetary remedy for a de facto regulatory taking has never been presented to the Court in such bold relief as in this case, which involves a total statutory prohibition without any provision for administrative relief.

The Appellant owns 21 acres of forest land in the mountain outside the City of Los

* A thorough analysis of the question and related issues is found in Bauman, The Supreme Court, Inverse Condemnation And The Fifth Amendment: Justice Brennan Confronts The Inevitable In Land Use Controls, 15 Rutgers Law Journal 15 (1983).

Angeles in the Angeles National Forest, which it had improved and used as a camp. In 1978, the camp was destroyed by flood. Before Appellant could rebuild, the County enacted a flood-control ordinance which expressly prohibited any construction or reconstruction on Appellant's land and effectively deprived Appellant of all economically viable use of the land. For more than seven years since enactment of the ordinance, Appellant has been deprived of the use of its land without any compensation. While Appellant's claim for just compensation has been pending, the County has effectively enjoyed an open-space easement, at the very least, over Appellant's land without paying anything. The benefits of the County's ordinance have been enjoyed by its citizens during all of that period, but the cost has been borne entirely by Appellant. Given these circumstances, any remedy that

does not include compensation to Appellant for the lost use of its land, since the date on which it was rendered substantially worthless by enactment of the flood-control restrictions on land use, would not be just and adequate.

ARGUMENT

I. The Issue Presented In This Case Requires A Decision On The Merits

Having agreed to look at the issue of whether there is a just compensation remedy for de facto takings that result from land use regulations for the fifth time in recent years, the Court must take this opportunity to decide the issue squarely on the merits.

Divergent state and federal court interpretations have led to confusion on the question of whether compensation is required by the Constitution when a regulatory taking occurs (i.e., whether the doctrine of inverse

condemnation should be engrafted upon our law). All of those involved in land use matters, along with courts and commentators, are awaiting this Court's resolution of this issue. Some courts have concluded that a majority of this Court will adopt Justice Brennan's dissent,* while other courts have

* Bank of America v. Summerland County Water Dist. (9th Cir. 1985) 767 F.2d 544, 547; Nemmers v. City of Dubuque (8th Cir. 1985) 764 F.2d 502, 505, n.2; United States v. Riverside Bayview Homes, Inc. (6th Cir. 1984) 729 F.2d 391, 398, rev'd on other grounds (1985) ___ US ___, 88 L.Ed.2d 419; Hamilton Bank v. Williamson County Reg. Plan. Comm'n (9th Cir. 1984) 729 F.2d 402, 408, rev'd on other grounds sub nom. Williamson County Reg. Plan. Comm'n v. Hamilton Bank (1985) 105 S.Ct. 3108; Martino v. Santa Clara Valley Water Dist. (9th Cir. 1983) 703 F.2d 1141, 1148 cert. denied, 464 U.S. 847; Barbian v. Panagis (7th Cir. 1982) 694 F.2d 476, 482, n.5; In re Aircrash in Bali (9th Cir. 1982) 684 F.2d 1301, 1311, n.7; Fountain v. Metro Atlanta Rapid Transit Auth. (11th Cir. 1982) 678 F.2d 1038, 1043; Hernandez v. Lafayette (5th Cir. 1981) 643 F.2d 1188, 1199-1200, cert. denied (1982) 455 U.S. 907; Pratt v.

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decided either that the majority will not adopt his position or that the Court has not yet squarely confronted the question.* The resolution of so important a constitutional issue should not rest on mere conjecture by lower courts but rather should be based upon

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State (Minn. 1981) 309 N.W.2d 767, 774; Burrows v. Keene (N.H. 1981) 432 A.2d 15, 20; Rippley v. City of Lincoln (N.D. 1983) 330 N.W.2d 505, 510; Suess Builders Co. v. City of Beaverton (Or. 1982) 656 P.2d 306; Annicelli v. South Kingston (RI 1983) 463 A.2d 133, 140; Zinn v. State (Wis. 1983) 334 N.W.2d 67; Corrigan v. City of Scottsdale (Ariz. 1986) ___ P.2d ___. (No. 18239-PR). See also Pioneer Sand & Gravel v. Anchorage (Alas. 1981) 627 P.2d 651 (reserving judgment on proper remedy in light of San Diego Gas, but allowing inverse condemnation action to go to trial); Sheerr v. Township of Evesham (N.J. Super. 1982), 184 N.J. Super.11, 61-62, 445 A.2d 46, 72-73.

* Citadel Corporation v. Puerto Rico Highway Authority, 695 F.2d 31, 33 at fn.4 (1st Cir. 1982); Aptos Seascape Corp. v. The County of Santa Cruz, 199 Cal. Reprtr. 191, 195 (1982).

the solid authority of this Court's sanction.*

A satisfactory resolution of this issue will not occur until this Court directly addresses and rules upon the basic issue of whether just compensation must be available when government regulation of land use is so restrictive as to effect a taking. Only this Court can finally decide whether the Fifth Amendment taking clause is a remedy for confiscatory land use regulations. Thus, until the Court resolves the question, interested persons, including courts, govern-

* The message implicit in San Diego Gas that regulatory takings must be compensated has not been received everywhere. E.g., Balent v. City of Wilkes-Barre, __ Pa. Cmwlth. __, 492 A.2d 1196 (1985), denying compensation remedy for a regulatory taking without mention of San Diego Gas, etc. despite a dissent noting that that decision had "cast doubt on decisions which limit the owner's remedy only to having the offending statute declared illegal." id. at 1199-1200.

ments and landowners, will continue to deal with the question on an ad hoc basis without the benefit of authoritative guidelines; lawyers will continue costly litigation of the issue; and government will continue enacting newer and more extensive regulations without, in many instances, considering the full cost of their ultimate impact upon landowners' private property interests.

Accordingly, we urge the Court to reach the merits of this case.

II. The Taking Is Final And The Compensation Issue Is Ripe

Although the question of the availability of just compensation as a remedy for de facto regulatory takings has been presented to the Court four times recently, the question has not been reached despite its acknowledged importance. MacDonald, Sommer and Frates v.

County of Yolo, 477 U.S. ___, No. 84-2015 (1986) (slip op. 7). In each of these earlier cases the Court could not reach the issue because it was not clear that administrative relief was not available, and the extent of the taking remained uncertain therefore. MacDonald, id. (slip op. 10-11). A claim for just compensation where the owner's 5-acre tract was zoned for from one to five single-family houses was rejected as premature because the owner had not established the actual extent of the permitted use by making application for permits. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). A claim for compensation for property taken by a rezoning was turned away where the lower courts "had not decided whether any taking in fact has occurred, [and] . . . further proceedings are necessary to resolve the federal question whether there has been a taking at

all." San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 633 (1981). An award of just compensation for a taking resulting from refusal to issue final permits pursuant to a previously approved general development plan was reversed where the owner had not formally applied for variances and also had not used available state inverse condemnation procedures to obtain compensation. Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. ___, ___, 105 S. Ct. 3108, 3117 (1985). Most recently, a claim for compensation for a taking resulting from denial of approval of a development plan was rejected as premature where the lower court had ruled that administrative relief might still be available to the owner, meaning that the Court could not be certain that the owner's property had been taken. MacDonald, supra, _____ (slip op. 11-12).

In stark contrast to the uncertainties of those previous cases, the instant case allows no doubt that a final taking has occurred. The ordinance, by its very terms, prohibits any development of the land. The ordinance does not make administrative relief available to Appellant. And, most importantly, neither the courts below nor the County took issue with Appellant's allegation that the ordinance deprived it of all viable use of its land. (The County's suggestion to the Court that Appellant can build "accessory buildings" is frivolous because the ordinance prohibits the main or principal buildings that are prerequisite to the existence of an accessory building.)

There is only one question left to be decided in this case, and that is the purely constitutional question whether a landowner is entitled to recover just compensation where a

government regulation effectively takes his property. The case is ripe for decision and the Court should delay no longer in reaching the merits.

This appeal affords the Court a unique opportunity to remove any doubt that the just compensation remedy, expressly held to be available in other regulatory settings, is also available where land use regulations are involved. Until the Court declares unequivocally that just compensation must be available whenever land use regulation effects a taking of private property, many lower courts* will continue to deny affected landowners access to

* E.g. Redevelopment Auth. of Oil City v. Woodring, 498 Pa. 180, 186, 445 A.2d 724, 727 (1982); Fred F. French Inv. Co., Inc., v. City of New York, 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381, app. dsmd. U.S., 97 S.Ct. 515, 50 L.Ed.2d 602 (1977); Fifth Urban, Inc. v. Bd. of Bldg. Standards, 40 Ohio App.2d 389, 320 N.E.2d 727, 733-734 (1974).

this fundamental remedy. Only this Court can prevent this.

III. Just Compensation For Regulatory Takings Is Mandated By The Fifth Amendment

The Court should now adopt the reasoning of Justice Brennan's dissent in San Diego Gas & Electric Co. v. City of San Diego 450 U.S. 621 (1981), which provides not only a legally correct analysis of the "taking" issue, but a practical and fair solution for all parties as well.

Speaking for four members of the Court in the San Diego Gas case,* Justice Brennan

* In addition to the three Justices who joined his dissent, Justice Rehnquist, although voting with the majority on the issue of finality, stated that he "would have little difficulty agreeing with much of what is said in this dissenting opinion of Justice Brennan." 450 U.S. at 633-34. This would seem to be tantamount to a majority in support

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addressed squarely the issue of compensable land use regulatory taking (which the majority did not do), and held that invalidation was not the exclusive remedy and that an otherwise valid regulation can, under a particular set of facts, effect a taking for which just compensation is required by the Fifth Amendment. In his review and analysis of the taking and property regulation cases, Justice Brennan correctly found that the Court has repeatedly acknowledged that regulation can effect a Fifth Amendment taking.

Refusal of the court below to follow the consensus of the Court, as enunciated by Justice Brennan, that a valid land use

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of Justice Brennan's views. Subsequently, Justice White with Chief Justice Burger joining him have adopted the views set forth by Justice Brennan in San Diego Gas. MacDonald, supra (dissent).

regulation could result in a compensable taking, does not appear to be justified.*

Recently, in an unanimous opinion in a straight condemnation case, the Court observed:

"We have frequently recognized that a radical curtailment of a land-owner's freedom to make use of or ability to derive income from his land may give rise to a taking within the meaning of the Fifth Amendment, even if the Government has not physically intruded upon the premises or acquired a legal interest in the property, thus, we have acknowledged that a taking would be effected by a zoning ordinance that deprived 'an owner economically viable use of his land.'" Kirby Forest Industries, Inc. v. United States, 467 U.S.1, ___, 81 L.Ed.2d 1, 13 (1984).

This Court has likewise pointed out, in upholding the enactment of the Federal Surface Mining Control and Reclamation Act, providing for regulation of surface mining, that:

* E.g. footnote 17, supra.

"A statute regulating the uses that can be made of property effects a taking if it denies an owner economically viable use of his land . . ." Hodel v. Virginia Surface Mining & Reclamation Association, 452 U.S. 264, 296 (1981).

If the Court does not intend the foregoing to be applied in the courts of this nation in land use regulation cases wherein compensation is sought, then it should say so now. The Court should take the opportunity presented in the instant case to put to rest any lingering doubts about the availability of just compensation for takings brought about by excessive land use regulations and should reverse the decision of the court below.

The Fifth Amendment is unequivocal in requiring that no private property may be taken unless just compensation is paid. It establishes both the right and the remedy, which properly interpreted, should leave no

room for the argument that the right may be protected by other remedies chosen at the state's discretion.

The just compensation remedy provision in The Fifth Amendment is self-executing and does not need any legislative action to give its effect. United States v. Clarke, 445 U.S. 253, 257 (1980). Accordingly, it can never be said that a government regulation is invalid because the legislature failed to provide for compensation in instances where a regulatory taking occurred.

Furthermore, as Justice Rehnquist said, the constitutional meaning of "just compensation" is the "full and perfect equivalent for the property taken." Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) (dissent). While invalidation can be a useful remedy, as a practical matter, it is rarely a full and perfect substitute for the

property rights taken. Therefore, just compensation must always be available, as in this case, to protect the landowner against takings effected by land use regulations.

Property rights deserve no less protection than personal civil rights, because they are so interdependent with each other as to be parts of the same whole. As this Court has said:

"Property does not have rights, people have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel is, in truth, a 'personal' right . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." Lynch v. Household Finance Corp., 405 U.S. 538, 522 (1972).

Just as the rights of persons to be free from illegal search and seizure and involuntary confessions are not protected

solely by the exclusionary rule, but are also protected by the right to seek compensatory damages,* so the right to be free from uncompensated taking of property should not be protected solely by invalidation, but should also be protected by compelling the payment of just compensation.

The Taking Clause, like the other constitutional protections, must be interpreted and applied in order to achieve its true purpose, which is to insure that the majority act with fairness and justice when imposing any burden on the individual citizen and not in a formalistic or doctrinaire fashion that sacrifices fairness and justice

* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). Unlike Bivens, however, where the Court had to fashion a damages remedy for violation of the Fourth Amendment, the framers of the Constitution established the "just compensation" remedy for public takings of private property.

for expediency or mechanical application of legalistic labels. The Taking Clause is intended to:

"bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as whole." Armstrong v. United States, 364 U.S. 40, 49 (1960).

The teaching of Lynch, supra, that personal and property rights are interdependent and inseparable, is confirmed by the direct impact of overly restrictive land use regulations on the rights not only of landowners, but also of persons who are unable to afford or to maintain a single-family house on a large lot, or on persons who cannot find lower-cost housing such as apartments, attached houses, or mobile homes because these uses are effectively prohibited by local regulation. These considerations are augmented by evaluation of the impact on the

location of places of employment as well as the impact of the kinds of employment available in a community.

At the time the Court upheld zoning as a proper government tool, the perception was that carefully controlled planning would assure that regulation would achieve the greatest public benefit without unduly burdening private property rights. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Since Euclid, however, the original purposes of land use regulation have all too often been transformed in application by too-aggressive legislatures. There is substantial and increasing concern that land use regulation, in its evolution over the six decades since Euclid, is increasingly being employed to hinder and, in some instances,

effectively block the most economically efficient use of land.*

For example, in a leading decision striking down exclusionary zoning, in which a township in a rapidly developing New Jersey suburb of Philadelphia had rejected a development plan purportedly because the land was not served with sewer and water utilities, and could not, therefore, be developed without threatening the environment, the Supreme Court of New Jersey found, to the contrary, that the land was flat and readily amenable to such utility installation, and that the environmental protection rationale, under the cir-

* B. Siegan, Regulating the Use of Land in the Interaction of Economics and Law, 159, 162, 163 (1977). See also, e.g. New York Times, 12/5/85, p.B1, "Westport [Connecticut] Striving to Restrain the Hands of Time," reporting a local effort to preserve the status quo by more burdensome zoning. A copy of the pertinent part of this article is appended.

cumstances, was merely a makeweight to support exclusionary housing measures or to preclude growth. Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel I) 67 N.J. 151, 336 A.2d 713 (1975).

These extreme forms of regulation frequently end up subsidizing certain favored citizens at the expense of others who are either excluded by the lack of housing within their means, or who pay "premium" prices for the restricted housing supply which results from such regulation. This kind of regulation injures the public welfare by discouraging the productive use of land and by rewarding speculators in the "down-zoning game."

The public welfare is harmed when land use regulation hinders rather than helps efficient free market allocation of housing, employment, commerce, and production.

A federal government task force has found that since the early 1970's, rising housing costs have been "greatly exacerbated by" growing local land use regulations that unnecessarily restrict new housing development. "These new factors that have quickened the pace of rising housing costs portend a long-term problem for the future unless major steps are taken." U.S. Department of Housing and Urban Development, Final Report of the Task Force on Housing Costs 4 (May 1978); see U.S. General Accounting Office, Report to the Congress -- Why are New House Prices So High, How are They Influenced by Government Regulations, and Can Prices Be Reduced? 41 (May 1978).

The Douglas Commission, in its exhaustive report to the President and Congress a decade and a half ago, found that certain zoning and other land use control abuses unnecessarily

increased housing costs to such a degree as to lead to exclusionary practices relating to residential developments. This frequently resulted when "[t]he community rigs its master plan and accompanying zoning ordinance" with "excessive" standards and prohibitions. One of the Commission's recommendations for a regulation that went so far as to take one's property was that compensation should be paid. This, the Commission thought, would assist in leading toward a more orderly urban development. Report of the National Commission on Urban Problems, Building the American City 18-19, 199-253 (specifically 206, 211-17, 224-26, 251) (1968). The Douglas Commission's findings were recently reemphasized and updated in the Report of the President's

Commission on Housing, 177-83, 199-200 (1982).*

The case now before the Court epitomizes all of these problems of land use regulation, which are encountered regularly throughout the nation, to a fault. It is a vivid, but unhappily not uncommon, example of narrow local interests serving themselves without regard for the property rights of the affected landowner or the broader public interest in an adequate supply of a variety of housing types, employment opportunities, and commercial enterprises, as well as religious camps and recreation facilities like Appellant's.

* See also L. Sagalyn & G. Sternlieb, Zoning and Housing Costs (1973); S. Seidel, Housing Costs and Government Regulations (1978); Ellickson, Suburban Growth Controls: An Economic and Legal Analysis, 86 Yale L.J. 385, 490 (1977); Roberts, An Appropriate Economic Model of Judicial Review of Suburban Growth Control, 55 Ind. L.J. 441, 461-64, 487-89 (1980).

The simple clarity of the Taking Clause has been obscured during the sixty years of development of zoning law since the Court in 1926 approved zoning as a valid use of the police power in Euclid, supra. This has been exacerbated by the fact that the Court thereafter essentially fell silent, leaving the determination of these matters to the state courts. Without the benefit of any further decision by the Court applying the Taking Clause to zoning and similar land use controls, state courts in California and elsewhere as well have held that the only remedy available to correct a burdensome land use regulation is invalidation, and that just compensation is never required because invalidation is deemed adequate to protect the property rights of the landowner.

IV. Two Distinct Questions: Validity Of The Regulation? -- Regulatory Taking?

Advocates of an exclusive invalidation remedy make the mistake of confusing de facto taking with invalid regulation. This is an unfortunate consequence of the continuing confusion outside of this Court of two distinct issues -- namely, substantive due process validity of a land use regulation (i.e., is it reasonably related to a public purpose?) and the taking question (i.e., does the regulation effectively deprive the owner of economically viable use?) As has been observed, regulatory validity and regulatory taking are distinct matters and are not mutually exclusive. San Diego Gas, supra at 647-653 (Brennan, J., dissenting). The fact that a regulation may be rationally related to promotion of health, safety and general welfare (i.e., is substantively valid) does

not preclude the possibility that the regulation may result in the taking of private property. Loretto v. Teleprompter Manhattan CATV Corp. 458 U.S. 419, 102 S.Ct. 3164 (1982). And conversely, the fact that land use regulation may effect a taking does not necessarily mean that it is invalid, but only that just compensation is due under the Fifth Amendment. Ruckelshaus v. Monsanto Co., 467 U.S. ___, ___, 81 L.Ed.2d 815, 839 (1984).

By carefully observing this distinction, two benefits will accrue. First, government can regulate land use in the public interest without fear of intrusive review by the courts, which should not become super-zoning hearing boards.* Second, the property rights

* E.g., Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J.158, 456 A.2d 390 (1983) (Mount Laurel II), where the court has undertaken an elaborate procedure to review and remedy local zoning decision.

of landowners will be more easily protected from uncompensated public taking.

The reason for requiring just compensation for all takings is that a regulatory taking and an eminent domain taking are not basically different in kind, but are essentially similar exercises of governmental control over property. San Diego Gas, supra at 651. Stated differently, it is of no help in analyzing whether a compensable taking has occurred, to categorize the government action as "regulatory" or "eminent domain" because these are merely convenient, and often misleading, labels for exercises of the government's police powers. Hawaii Housing Authority v. Midkiff, 104 S.Ct. 2321, 2329 (1984).

Since any exercise of police power must meet the substantive due process test of substantial relationship to the promotion of the public health, safety and general welfare,

there is always a threshold question of validity, but it is not the end of the inquiry, for,

"[i]f the regulation denies the private property owner the use and enjoyment of his land and is found to effect a 'taking,' it is only fair that the public bear the cost of benefits received during the interim period between application of the regulation and the government entity's rescission of it." San Diego Gas, supra, at 656 (Brennan, J., dissenting).

Because a finding that a regulation is substantively valid has only an effect similar to a finding that an eminent domain action is for a valid public use, it follows that such a finding of regulatory validity does not answer, but instead begs, the question of whether a taking has been effected. In other words, where a landowner is regulated by valid laws, just compensation may still be necessary if the regulatory effect on the land constitutes a de facto taking. San Diego Gas,

supra, at 656 n.23 (Brennan, J., dissenting); Ruckelshaus, supra.

V. Invalidation By Itself Is Not An Adequate Remedy

Because courts properly defer to the legislative body's discretion in enacting land use restrictions, as in any exercise of the police power, U.S. v. Riverside Bayview Homes, __ U.S. __, 106 S.Ct. 455, 460 (1985); Ruckelshaus, supra; Hawaii Housing Authority v. Midkiff, 104 S.Ct. 2321 (1984); Euclid, supra, a heavy burden of proof (usually the test of "arbitrary, capricious and unreasonable action") is imposed upon the landowner who challenges a land use regulation, to overcome the presumption of substantive validity. Protected from broad review by this judicial deference, municipalities can usually, with little effort, defend even very

far-reaching and burdensome land use regulations by suggesting the slightest relationship with public health, safety and general welfare. In the instant case, the substantive validity of the regulation is not questioned since flood management and control are clearly within the police power of the County. On the other hand, the ordinance should not be declared invalid to the extent that it effects a de facto taking, because this is a drastic and unnecessary remedy that needlessly requires the judicial branch to usurp the legislative function. The appropriate judicial remedy for a de facto taking is just compensation. The decision to modify or revoke a de facto taking should be left to the legislative body that caused the taking.

Another inherent weakness with invalidation is that it is not an affirmative remedy, and a successful challenge will, thus, leave

the landowner without any approved use, but still confronted by a municipality with the continuing power to regulate use of the land. Even after a court invalidates one ordinance, a municipality may very well continue to adopt prohibitory ordinances, one just as invalid as the preceding illegal action.* Thus, invalidation can readily deteriorate into a prolonged stalemate of repeated challenges and new regulation which serves only too well the exclusionary purposes of a municipality but does not provide an adequate remedy for the landowner whose costs and expenses accrue inexorably.

An unfortunate example of this policy of bad faith response to invalidation can be seen

* See San Diego Gas, supra at 656 n.22 (1981)(dissenting opinion).

in the Mt. Laurel cases where the Supreme Court of New Jersey initially said, "[W]e, the Court, trust Mount Laurel [Township] will amend its ordinance in the spirit we have suggested without judicial supervision."

Mt. Laurel I 336 A.2d 713, 734 (1975). The same court, eight years later, was forced to conclude that, "our trust was ill-placed."

Mt. Laurel II, 456 A.2d 390, 460. The municipality was still engaged in exclusionary zoning and its efforts to amend its zoning had been "little more than a smokescreen that attempts to hide the township's persistent intention to exclude housing for the poor."

Id.*

* A current overview of the still unresolved problem of exclusionary zoning in New Jersey after Mt. Laurel, is found in "New Jersey's Struggle with Fair Housing," New York Times, 12/1/85, p.16E, a copy of which is to be found in the Appendix.

Moreover, invalidation does not compensate the victorious challenger for the costs or for the interim loss of the full lawful use of his property. As a result, many landowners are either financially unable to protect their constitutional rights in property or, if able to do so, will pass the cost of victory along, thereby inflating housing prices, land costs, and rents.

Finally, invalidation does not provide an effective deterrent against regulation which constitutes a taking. This can be provided only by compelling the municipality to be concerned about potential financial liability and thus causing it to avoid encroachment on protected rights. Owen v. City of Independence, 445 U.S. 622 (1980). A decision by this Court requiring compensation for excessive regulatory taking would not detract from a municipality's right to regulate reasonably,

but rather would serve the salutary purpose of encouraging land use regulation to be enacted with an acute regard for the constitutionally protected rights of individuals.*

In a recent case this Court upheld a landowner's claim for compensation for the burden imposed on her apartment building by a state law regulating the relationship among landlord, tenant, and cable television company. The Court rejected the New York Court of Appeals' traditional analysis that the regulation was a legitimate use of police power precluding just compensation. The Court held that although the regulation was valid,

"It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid."

Loretto v. Teleprompter Manhattan

* See Comment, Just Compensation of Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations, 29 UCLA L. Rev. 711, 724-32 (1982).

CATV Corp., 458 U.S. 419, 425 (1982).

VI. Availability Of Just Compensation Will Not Hinder Land Use Regulators

The argument, that the potential for liability for an award of just compensation for a regulatory taking is inimical to effective land use regulation for the public good,* only emphasizes the wisdom of Justice Holmes' warning in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) against succumbing to the temptation to excuse violation of the Taking Clause by resort to the police power justification. He said, referring to the Taking Clause:

* In fact, the availability of a compensation remedy for temporary takings should lead to more efficient land regulation. See Blume & Rubinfeld, Compensation for Takings: An Economic Analysis, 72 Calif. L. Rev. 569, 572, 582, 623-24 (1984).

"When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. We are in danger of forgetting that strong public desire to improve the public condition is not enough to warrant achieving the desire by a short cut than the constitutional way of paying for the change." Id. at 415-416.

Unlike the drastic remedy of invalidation, just compensation not only gives full and complete relief to the injured landowner, but also saves the regulation, properly leaving it to the elected legislative entity to decide whether to retain, modify or revoke the regulation. Thus, the just compensation remedy is preferable because it is consistent with the sound policy that courts should avoid invalidating legislative decisions and should construe a regulation in the light most favorable to a finding that it is constitutional. Ruckelshaus v. Monsanto Co., 467 U.S.

___, 81 L.Ed.2d 815 (1984); Hawaii Housing Authority v. Midkiff, ___ U.S. ___, 81 L.Ed.2d 186 (1984); U.S. v. Riverside Bayview Homes, 729 F.2d 391 (6th Cir., 1984) ___ U.S. ___, 88 L. Ed. 419 (1985).

The argument that effective land use regulation will be severely curtailed by the fear of liability for just compensation is pleaded by planners and land use regulators. It is, however, of no constitutional merit and is contrary to the sworn duty of all public officials to uphold the Constitution. As the Court said recently in rejecting a similar argument:

"[A public official] would be derelict in his duties if at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury." Owen v. City of Independence, 445 U.S. 622, 656 (1980)

The Court has also rejected the argument that a compensation remedy may be barred if it is "too expensive." This argument, voiced insistently by state and local government, probably greatly exaggerates the fiscal impact of a just compensation remedy, and if it does not exaggerate then it is an admission of widespread public takings of enormously valuable private property rights for which no compensation has been paid. In either case, the argument is offensive to the fundamental concept that certain individual rights, including ownership of property, are protected by the Constitution even at the expense and inconvenience of the majority.

"[V]indication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them" Watson v. City of Memphis 373 U.S. 526, 537 (1963).

It is also suggested by government regulators that compensation is not required for takings caused by land use regulation because such takings are not intended and are not actually takings until the regulators refuse to rescind or modify the regulation as applied to particular properties. In particular, this argument rejects compensation for temporary or interim takings between the time of enactment of the regulation and its revocation, which Justice Brennan proposed in San Diego Gas, supra.

This attempt to avoid compensation for interim takings is not persuasive, however, because its basic premises is simply that a compensable taking does not occur until there is actual intent to take as distinguished from intent to regulate. Taking does not require intent. Hughes v. Washington, 389 U.S. 290, 298 (1967) (Stewart, J. concurring). The lack

of an intent to effect a taking is immaterial and will not excuse violation of the constitutional right to just compensation. Owen v. City of Independence, 445 U.S. 622, 651-652 (1980). The taking occurs when a regulation effectively deprives the landowner of the economically viable use or reasonable investment-backed expectation of use of his land, not when the governing entity refuses to end the taking by rescinding or modifying the regulation. Kirby Forest Industries, Inc. v. U.S., 467 U.S., 1, ___, 81 L.Ed.2d 1, 10-11 and 13-14 (1984); U.S. v. Clarke, 445 U.S. 253, 258 (1980). In Kirby Forest, supra, the Court said that restrictions imposed on land use preliminary to formal condemnation would, if severe enough, accelerate the date of the taking. The same logic requires compensation for regulatory takings even though they are later terminated by a legislative decision

rescinding the regulation. The operative factor triggering just compensation is deprivation of property regardless of how or why government causes the taking.

A decision by the Court that just compensation is mandated for land use regulatory takings, whether permanent or interim, will not prevent the states from adopting reasonable procedural requirements, including statutes of limitation and notice of claim provisions, that may alleviate many of governments' concerns about large retroactive claims and lack of notice and opportunity to mitigate taking damages. But it is essential that a full compensation remedy be available in cases, like like this one, of regulatory taking.

CONCLUSION

The decision below should be reversed because payment of just compensation to Appellant for the loss of the economically viable use of its land, as a direct result of land use regulations imposed by Appellees, is mandated both by the Taking Clause of the Fifth Amendment and by the welfare of society as a whole.

A remedy awarding just compensation would provide the following advantages: it would implement the purpose of the Fifth Amendment, achieve a "fair" outcome, reduce pressures on landowners and courts to use the drastic invalidation remedy to overturn land-use regulations, and encourage planning officials to weigh carefully the potential public costs, as well as the potential public benefits, of restrictive land use regulations. On the other hand, this remedy would not chill the

government's ability to regulate; rather it would encourage the government to make a more careful, more thorough cost-benefit analysis of the overall impact of the contemplated regulation.

Although this year is the sixtieth anniversary of Euclid v. Ambler, supra, the principal enunciated four years before that landmark zoning case, by Mr. Justice Holmes in Pennsylvania Coal Co. v. Mahon, supra, must be newly and resoundingly reaffirmed by this Court:

"a strong public desire to improve the public condition is not enough to warrant achieving the desire by a short way than the constitutional way of paying for the change."

Respectfully submitted,

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The Region Continued

New Jersey's Struggle With Fair Housing

By ANTHONY DePALMA

FOR 15 years, New Jersey and its municipalities have been grappling over how to provide low-cost housing in the developing suburbs, where most new jobs are and where many people want to live. Most suburban communities, for their part, have tried to maintain traditional zoning, requiring large building lots and minimum house sizes. They did so, local officials have said, to preserve their communities' character. But such zoning also guaranteed that housing would be expensive, and thus many suburbs were closed to low-income and moderate-income people.

Exclusionary zoning has been challenged in other states, but nowhere have the courts stepped in as they have in New Jersey. First in 1975, then in stronger terms in 1983, the State Supreme Court ruled unconstitutional the zoning in Mount Laurel, a township in Burlington County east of Camden, without a main street, a supermarket or, until recently, its own post office.

Each time, the court said municipalities cannot use zoning to keep out the poor, and must provide their fair share of housing opportunities for all classes of people. In 1983, after communities had dragged their heels, the court employed the profit motive to correct the social imbalance. It introduced something called "the builder's remedy," which allowed developers to build more houses if they sold at least 20 percent of the units at reduced prices to low-income and moderate-income families.

Many communities have resisted the Mount Laurel decisions because of the economic and social issues they raised. There has also been a political backlash. Critics contend that the court overstepped its authority, taking over what was once considered solely a municipal responsibility. The court said the need to provide housing for all people was so important that it was willing to act if the Legislature and the Governor were not.

Finally, in July, the Legislature responded. It established the Fair Housing Council to help municipalities determine what their fair share of low-cost housing should be. The Legislature also made \$125 million available to subsidize the construction and rehabilitation of low-cost residences. Proponents say the council, which is just beginning to draw up guidelines, will produce affordable housing. But others view the panel as simply another layer of bureaucracy, one that is likely to allow

many municipalities to delay settling housing cases for years, and perhaps to wriggle out of their fair-share obligations altogether.

The Supreme Court has decided not to hand over to the council about a dozen longstanding cases. To force the court out of the housing business, some legislators have begun drafting bills to change the State Constitution. They have the support of Governor Kean, along with 266,000 voters who, in separate nonbinding municipal referendums on Nov. 5, supported such an amendment.

The long legal battle has bruised relations between the Legislature and the courts, split cities and suburbs and heightened tensions between the state's haves and have-nots. And while the struggle has not yet resulted in the building of much low-cost housing, it has at least produced a resolution in the township where it all began. Under a settlement, Mount Laurel officials recently agreed to accept more than 1,000 lower-priced houses and more than 900 prefabricated ones. Many municipalities still must come to grips with the court's dictates. Each faces different pressures and needs. Here is a look at the different ways in which three communities responded.

Buying Time and Resisting Change

CRANBURY, N.J. — This township is an anomaly in Middlesex County. Off Exit 8A of the New Jersey Turnpike, not too far from the office developments that have sprouted along Route 1 between Princeton and New Brunswick, Cranbury remains a quiet community surrounded by 13 square miles of farm land, much of it in potatoes, grain and soybeans.

In 1974, the Urban League of Greater New Brunswick sued Cranbury, along with most Middlesex municipalities, contending that its one-acre zoning and other restrictions had denied low-income and moderate-income people an opportunity to live there.

Township officials argued that any drastic changes would harm the community's character, and they set out to demonstrate just how unusual it was, lobbying suc-

cessfully to place the village center on the National Register of Historic Places and designating about half the township as an agricultural preservation area.

But in 1983 four developers who wanted to build in Cranbury joined the Urban League suit, seeking the builder's remedy. Their proposals called for 200 units; Cranbury now has fewer than 800 houses.

Local officials, led by Mayor Alan A. Danser, a young potato farmer, contended that the municipal water, sewerage and traffic control systems would be impossibly overburdened. Their objections notwithstanding, the Supreme Court appointed an arbiter, called a master, to oversee Cranbury's rezoning. Township officials have cooperated, largely because they had no choice, accommodating most of the growth by rezoning the area nearest the turnpike. Much of that is farm land, including a sizable parcel owned by the Mayor's father.

Although it has rezoned, Cranbury has not given up. Township officials have applied for a transfer of their case from the court-appointed master to the new Fair Housing Council. They believe the council would be more likely to respect the agricultural preservation district and historic area as legitimate reasons for reducing Cranbury's housing obligations. However, the Supreme Court has refused to give up the case.

The resistance to the Mount Laurel decisions by Cranbury's leaders has not been as colorful or obstinate as some — the Mayor of neighboring Monroe Township has vowed to go to jail rather than rezone — but the results have been the same. In the 11 years since the Urban League suit was filed, only four low-cost houses have been built in Cranbury.

A Borough Decides To Build on Its Own

BERNARDSVILLE, N.J. — Tucked in the Somerset Hills, this borough has been blessed with an abundance of open space and people rich enough to protect it.

Unlike many of its neighbors in Somerset County, Bernardsville never opened its borders to corporations relocating along the interstate highways. Nonetheless, the demand for housing was tremendous.

In 1984, a local landowner proposed building 170 town houses on eight and a half acres near the village center. The owner eventually went to court, where Judge Eugene Serpente, one of three judges appointed by the Supreme Court to hear all Mount Laurel zoning cases, authorized the building of 76 town houses, 20 percent of them to be set aside for low-income and moderate-income families.

"That was resolved, but the borough still felt in an uncertain position," said Robert J. O'Grady, Bernardsville's planning consultant. Until it had a master plan that incorporated its obligation to build low-cost housing, Bernardsville was vulnerable to similar suits by other developers.

Using a court-accepted formula, local officials determined that the borough's fair share amounted to 290 units, including some existing houses. But to entice developers to build low-cost housing, officials would have been forced to permit them to construct four market-rate units for each low-cost one; the profits from the full-price houses would have subsidized the others. The net result: Bernardsville would have had to accommodate nearly 1,000 new units, almost doubling its housing stock.

Many residents believed that such explosive growth would have destroyed Bernardsville's character and se-

verely strained its municipal resources.

But the borough came up with an alternative — to build only the low-cost housing. Bernardsville will sell bonds, using the revenue to subsidize each house. Local officials calculate that this will add about 25 cents to the tax rate, now \$2.09 per \$100 of assessed value. In the end, Mayor Peter S. Palmer said, taxes will be no higher than they would have been if 1,000 houses had been built and the necessary municipal services added.

No other jurisdiction has followed Bernardsville's example. The reason, said Mr. O'Grady, is political.

"The governing bodies don't feel they should get into the housing business," Mr. O'Grady said, "and the residents don't want to see their tax dollars going into subsidized housing."

The First Phase Of a Fair Share

BEDMINSTER, N.J. — A township with a patrician tradition and a good deal of empty land, Bedminster came to symbolize both resistance to low-cost housing and, ultimately, acceptance of the Supreme Court's decisions.

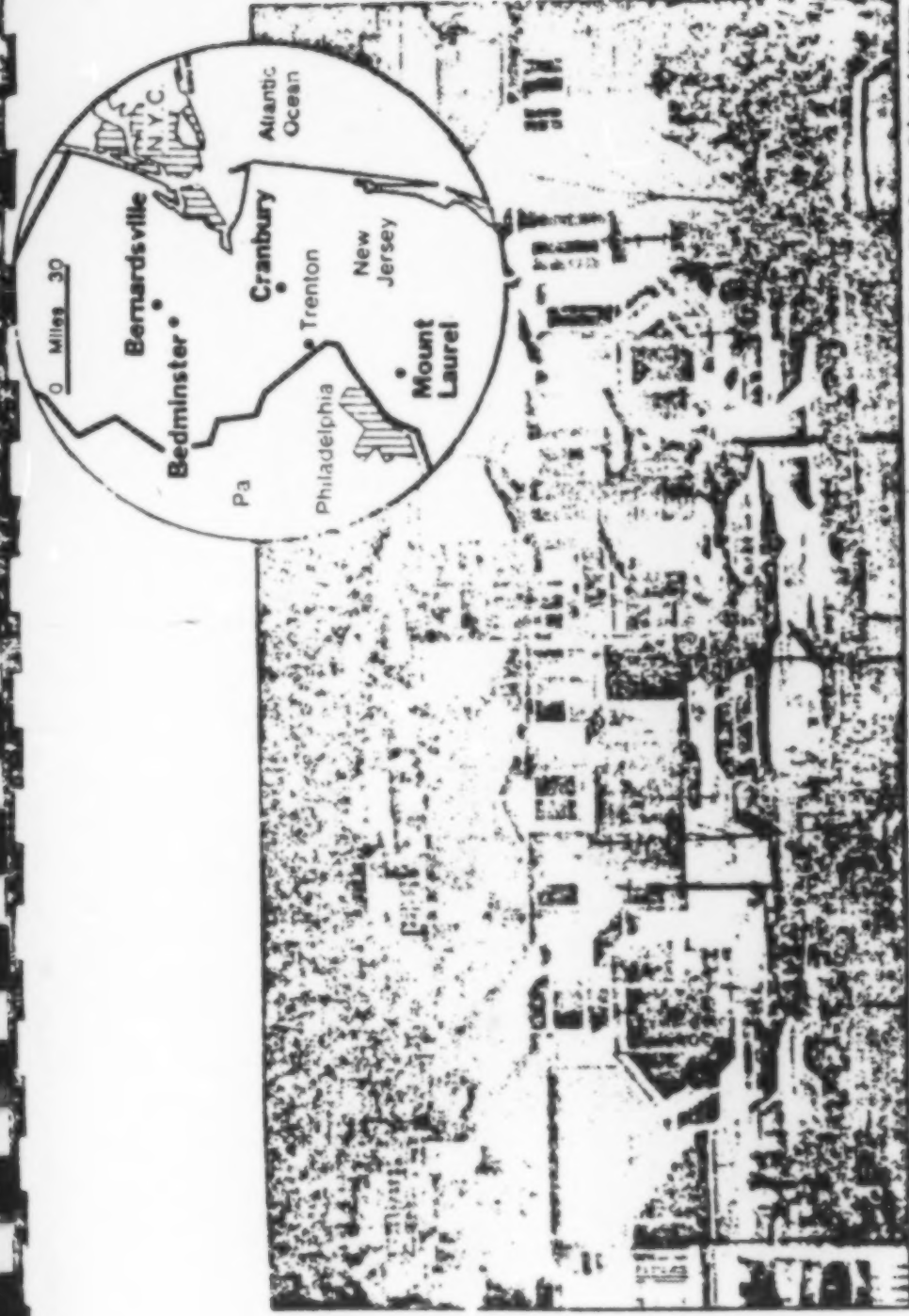
The legal dispute here began in 1969, before the first Mount Laurel ruling, and was instituted by the Allan-Deane Corporation, a subsidiary of the Manville Corporation. Allan-Deane had purchased 1,500 acres in Bedminster and adjoining Bernards Township. Most of Bedminster was zoned for lots of five acres or more, but Allan-Deane had something else in mind: a new community covering a mountainside. The proposals, which changed over time, ranged from 500 single-family homes to enough housing for 14,000 people.

What resulted was a no-holds-barred legal joust. According to Alan Mallach, a planner who has been involved in the case for many years, both Bedminster and Allan-Deane set out to spend whatever it took to win. "It was like two heavily armored knights slogging away at each other," he said.

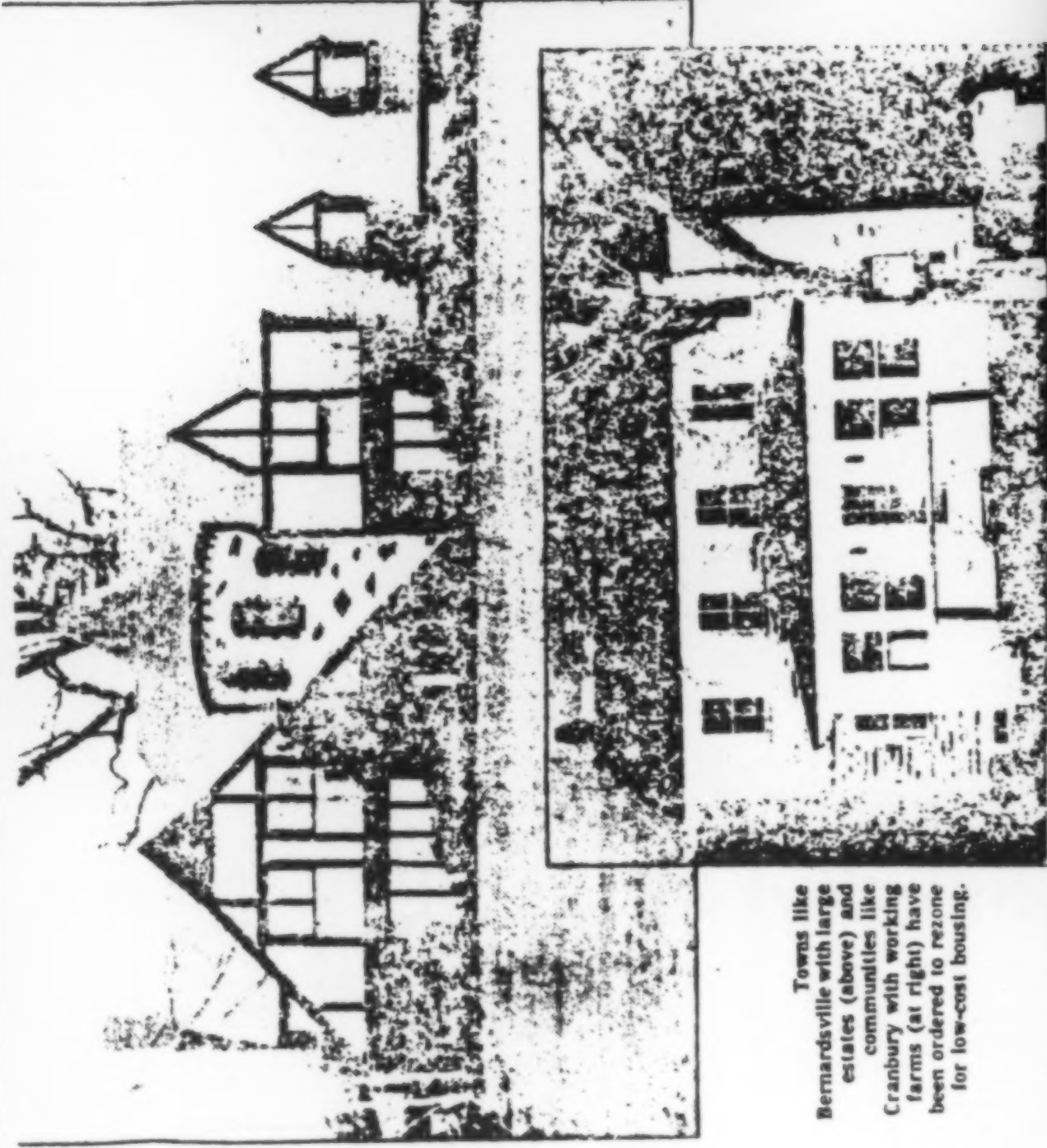
Bedminster contended that its semi-rural character would be ruined by such a huge development, though, in the early 1970's, the township welcomed the headquarters of A.T.&T. Long Lines and its 3,500 employees. There were also environmental concerns: Bedminster argued that runoff from the development would harm trout in the Raritan River, Mr. Mallach said. Allan-Deane countered with a computer model of the runoff that suggested its effect on the trout would be minimal.

Bedminster took the case as far as the United States Supreme Court, but to no avail. By the time the second Mount Laurel decision was handed down in 1983, the township had worked out a plan for the site. Allan-Deane was allowed to build more than 1,200 units, if 20 percent were set aside and subsidized; 260 town house apartments in the first phase of The Hills, as the development is known, have been sold to low-income and moderate-income families.

A nonprofit housing corporation screened hundreds of applicants and selected those allowed to buy the units for \$26,500 to \$35,500. Comparable housing in The Hills sold for as much as \$89,000. A survey of the first 200 buyers showed that most were employed in the area as clerks, waitresses, computer operators and teachers. Bedminster's overall Mount Laurel obligation was determined to be about 800 units, most of which will be built on land controlled by Allan-Deane. Construction of the next 180 low-cost units is scheduled to begin by next summer.



The Hills, a town house development, has transformed the suburban community of Bedminster, N.J.
Photographs by The New York Times / Roberta Lichman



Towns like
Bernardsville with large
estates (above) and
communities like
Cranbury with working
farms (at right) have
been ordered to rezone
for low-cost housing.

Westport Striving to Restrain the Hands of Time

By DIRK JOHNSON

Special to The New York Times

WESTPORT, Conn., Dec. 4 — In the 1955 novel "The Man in the Gray Flannel Suit," this town served as the archetypical "bedroom community" for striving young executives with jobs in the New York City and children in school.

But Tom Rath, the story's harried hero, no longer would need to depart each morning on the 7:40 train for the city. Instead, he could probably find work right here.

Indeed, workers commuting to Westport now outnumber those leaving. Since 1972, commercial development here has nearly tripled — even though the population has remained at about 25,000 — and some residents are fearful of losing the small town charm.

"The whole nature of the town has changed," said Sidney B. Kramer, leader of a group called Save Westport Now. "We don't want to become another Stamford — a little city dominated by office buildings."

A proposed moratorium on further commercial development goes before the town's planning and zoning commission tomorrow. If approved, the town would reject new building proposals for the next nine months, while the commission tightens its zoning codes.

"Condos, we're getting condos —

An "abysmal addition to the landscape," said Mr. Kramer. "And the price. On some days, cars are tied up from the Merritt Parkway to Duck Pond Road."

Kramer, owner of the Remarkable Book Store, said the building has driven rents so high that "independent shops can afford to

like Tallor and Welch's Hard-

ware have been forced to close, he said. While Main Street has become an "ad" by corporate-owned stores, such as Laura Ashley and Le Bonheur.

Meanwhile, four elementary schools have closed since 1974, in part because housing prices have soared beyond the reach of many young couples with children. "It's not the small

town of 30 years ago," Mr. Kramer said.

"We can't turn back the hands of time," countered Anthony Slez Jr., an attorney and Westport native who opposes the moratorium. "I can remember when this town was so small you could sneeze in Saugatuck and somebody in Greens Farms said, 'God bless you,'" he said, referring to two different neighborhoods in town.

"But let's be fair," he added. "Are we going to blame the owners of commercial property?"

Mr. Slez, a third generation Westporter, believes the moratorium is the work of newcomers who arrived in town with fixed notions of Westport as "a quaint little rural town" and become disenchanted to find it's a bustling little metropolis.

As a boy working at his father's gas station, Mr. Slez said he remembered New Yorkers stopping to ask for "directions to the artist's colony."

"I guess," he laughed, "that they thought there was an actual compound for the artists."

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No. 85-1199

IN THE
Supreme Court of the United States

October Term, 1985

**FIRST ENGLISH EVANGELICAL LUTHERAN
CHURCH OF GLENDALE, a California corporation,**
Appellant,

vs.

COUNTY OF LOS ANGELES, CALIFORNIA,
Appellee.

**Brief of
California Building Industry Association
as Amicus Curiae
in Support of Appellant**

With consent of the parties, The California Building Industry Association (CBIA) submits this amicus curiae brief in support of the Appellant.

INTEREST OF AMICUS CURIAE

CBIA is an umbrella organization of some 5,000 home builder company members, and, as such, is vitally concerned with harsh land use regulations that impact adversely on its members' economic interests and on the availability of housing.

As is alarmingly evident in California (but by no means confined to it), harsh land use restrictions often simply prevent housing construction where it is most needed, and thus effectively bar entry not only into desirable suburbs, but also into homeownership altogether by the young, the middle class, and particularly minorities.¹

In the context of the issues at bench, the self-interest of CBIA's members coincides with the interest of the populace and with the public interest. CBIA is interested in building homes for people who need them. So is a growing segment of the population that is priced out of homeownership, and thereby sentenced to protracted or permanent status as a sort of an apartment renter under-class.² It is in the public interest to provide increased housing opportunities for that population. Effective remedies for

¹ It is undoubtedly judicially noticeable that California's housing is the most expensive. Some 18-20% of the cost in the San Francisco Bay area, for example, is attributable to land use regulations, such as growth controls and moratoria. Katz and Rosen, *The Effects of Land Use Controls on Housing Prices*, at p. 47, Working Paper 80-13, Center for Real Estate and Urban Economics, University of California, Berkeley. See Thorsberg, *Bay City Housing Costs Drive Residents Away*, Los Angeles Times, July 28, 1985, Part VIII, p. 22. The problem, moreover, is increasingly present beyond California; see Report of the President's Commission on Housing (1982), particularly Chap. 13, "Government Regulation and the Cost of Housing," pp. 1-5 et seq. Also see, Kratovil, *Eminent Domain Revisited and Some Land Use Problems*, 34 De Paul L. Rev. 587, 615 (1985).

² See *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394-395 (1926).

excessive, use-stultifying land use regulations will help provide such opportunities.

SUMMARY OF ARGUMENT³

Irrespective of what else may be decided in the case at bench, CBIA urges that the Court re-examine the totality of procedural rules that emerged piecemeal in *Agins*, *Williamson County* and *MacDonald*, because when taken together, they lead to excruciating anomalies, replete with injustice and waste of judicial resources. Unless modified by this Court at the earliest opportunity, this is certain to engender still more protracted and confusing litigation.

For example, where a landowner obeys the *Williamson County* rule and seeks just compensation in state courts first, what are the federal res judicata/collateral estoppel effects of such preliminary state court litigation? What if compensation is granted but is contended to fall short of the constitutional norm? What are the federal courts to make of that? Are U.S. District Courts after *Williamson County* to sit as tribunals reviewing state court decisions in land use cases, or are they to try these causes *de novo*?

Similarly, under *MacDonald*, how does the prevailing doctrine of futility operate? How many times is a land owner required to perform the administrative equivalent of beating his head against the wall, and seek successive administrative approvals of his plans? At what cost?

What if the aggrieved landowner is not a developer at all, but an ordinary citizen who simply lacks the skills and funds that are needed in copious quantities to run the regulatory gauntlet, Lord knows how many times?

³ CBIA has heretofore filed an amicus curiae brief in *Williamson County* (No. 84-4) and the Court's attention is respectfully invited thereto (at pp. 9-27) for a full articulation of CBIA's arguments on the issue of remedies.

Above all else, CBIA urges that the state of the law has reached an alarming condition in which — in some parts of the country — literally no one can tell without a decade of litigation how a governmental entity or a landowner is to go about its business that involves a land use regulation.

The law of remedies is in a state of outright chaos. In New Hampshire and Rhode Island “just compensation” is the remedy. Yet, those states’ federal Circuit, the First, disagrees. In the Southeast, even though the 11th Circuit has aligned itself with Mr. Justice Brennan’s views in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 636 (1981), favoring just compensation, Florida disagrees, while Georgia opts for damages as the sole remedy. In the West, California, the home of *Agins*, of course, hews to the no-compensation approach, but Arizona has just disagreed in *Corrigan v. City of Scottsdale*, 720 P.2d 513 (Ariz. 1986). All while their mutual Circuit, the 9th, says plainly that California is wrong. *The astonishing thing is that all these courts purport to be deciding the same law of remedies under the Fifth Amendment of the U.S. Constitution!*

With the utmost respect, this situation must not be permitted to go on. Fortunes are being squandered in repetitive, often pointless litigation, trial courts are left without precedential guidance, families are being deprived of needed homes, land is rendered useless and lost by foreclosure, (see *infra*, fn. 6) governmental entities cannot tell when they go “too far” in regulating land, nor what the consequences will be if in their zeal to please vocal constituencies they transgress constitutional rights of landowners. CBIA strenuously urges that the court address the issue this time and provide guidance to public and private interests alike.

To that end CBIA respectfully urges the Court to hold that the “just compensation” expressly provided by the

Constitution is the proper remedy in taking cases, as the Court has done in every case against the federal government, in which takings remedies were in issue.⁴ The scope of that remedy in zoning cases has already been outlined in Mr. Justice Brennan’s opinion in *San Diego Gas & Elec. Co. v. City of San Diego*, *supra*, which has been adopted by numerous Circuits and state courts.

The reasons for the position espoused by this amicus are:

First, the “just compensation” remedy is explicitly provided for in the Constitution.

Second, this Court’s precedents on the issue of remedies for uncompensated takings, beginning at least with *Hurley v. Kincaid*, 285 U.S. 95 (1932) and continuing through *Ruckelshaus v. Monsanto Co.*, 104 S.Ct. 2862, 2880 [8] (1984), and *United States v. Riverside Bayview Homes, Inc.*, 106 S.Ct. 455, 459-460 (1985), make it crystal clear that just compensation is the preferred remedy because it tends to make the aggrieved citizen whole, while permitting the governmental entity to pursue “. . . the accomplishment of important governmental ends . . .” (*Hurley v. Kincaid*, *supra*, 285 U.S. at 104, fn. 3). That approach is consistent with the general law of remedies against the government; see the definitive treatment of this topic in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949)

Third, as astutely noted by Mr. Justice Brennan, non-monetary remedies tend to be ineffective, and provide enormous opportunities for governmental entities to drag their feet or even to act in bad faith); *San Diego Gas and Elec. Co. v. City of San Diego*, *supra*, 450 U.S. at 655, fn.

⁴ Please see CBIA’s amicus curiae brief in *Williamson County* (No. 84-4) at pp. 9-12. See *United States v. Riverside Bayview Homes, Inc.*, 106 S.Ct. 455, 459-460 (1985)

22).⁵ See particularly the Amicus Curiae Brief of Donald and Bonnie Agins, at pp. 5-6.

Fourth, specific remedies require ongoing judicial supervision. Injunctive relief requires judicial oversight and continuing enforcement, thereby embroiling courts far more deeply in local land politics, than would the decision whether a particular regulatory scheme took a "stick" from the landowner's bundle of rights, thus requiring pro tanto recompense.

Fifth, as explicitly recognized in *Owen v. City of Independence*, 445 U.S. 622, 651 (1980), the imposition of compensatory damages not only effectively redresses the wrong (and indeed is the only way of doing so where economic injury has already occurred),⁶ but also provides a wholesome deterrent to future constitutional wrongdoing.

Finally, clarification of the law of takings, and of effective remedies, will have the wholesome effect of balancing the social scales. Land regulations are applied by an array of powerful governmental bureaucracies using a tough enforcement apparatus whose constitutional limitations need to be understood. In short, it is time to strike a balance between regulatory ends and constitutionally respectable means. Allowing the victim of an overzealous regulatory process to recover for demonstrable losses, will tend to accomplish just that, and to vindicate the

⁵ The inefficacy of specific remedies was also stressed by Richard F. Babcock, in his noted book, *"The Zoning Game,"* (1966) at p. 13.

⁶ California law alone is replete with cases in which owners lost their property by foreclosure while being "regulated" to death. See, e.g., *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353, 1366-1367 (9th Cir. 1978); *Orsetti v. Fremont*, 80 Cal.App.3d 961, 146 Cal.Rptr. 75 (1978); *Hollister Park Investment Co. v. Goleta County Water Dist.*, 82 Cal.App.3d 290, 147 Cal.Rptr. 91 (1978); *Frisco Land & Mining Co. v. State*, 74 Cal.App.2d 736, 141 Cal.Rptr. 820 (1977); *County of Los Angeles v. Berk*, 26 Cal.3d 201, 161 Cal.Rptr. 742, 605 P.2d 381 (1980); *Toso v. City of Santa Barbara*, 101 Cal.App.3d 934, 162 Cal.Rptr. 210 (1980).

important values inherent in the Constitution's protection of the citizen from governmental overreaching.

ARGUMENT

I.

THE NEWLY-CREATED PROCEDURAL UNCERTAINTY CRIES OUT FOR CORRECTIVE ACTION BY THE COURT; IT IS IMPOSSIBLE IN SOME PARTS OF THE COUNTRY TO TELL WHAT "PROPERTY RIGHTS" A LANDOWNER ACTUALLY "OWNS," BECAUSE HE CANNOT TELL HOW HIS LAND CAN BE USED, AFTER A LENGTHY, REPETITIVE ADMINISTRATIVE PROCESS, FOLLOWED BY TWO ROUNDS OF LITIGATION IN TWO DIFFERENT COURTS.

Inasmuch as CBIA has earlier appeared amicus curiae in *Williamson County Planning Comm'n. v. Hamilton Bank*, 105 S.Ct. 3108 (1985), the Court's attention is respectfully invited to CBIA's brief (pp. 9-27) in that case (No. 84-4). The present brief, while reiterating those arguments, addresses new concerns that have arisen by virtue of the procedural rules laid down in *Williamson County* as well as *MacDonald*, and which have resulted in chaotic conditions. See generally, Berger, *Anarchy Reigns Supreme*, 29 Jour. Urb. & Contemp. L. 39 (1985). The emerging procedural confusion is so alarming, that it warrants another, searching look, irrespective of what else the Court may decide herein.

We suggest that in deciding these cases one by one, the synergistic interaction of the emerging procedural implications may not have been fully considered. There is thus an urgent need to take an integrated look at the procedural aspects of the "taking issue," because the interaction of the newly minted procedural rules with one another, and with existing rules gives rise to positive conundrums. For example, in *MacDonald* the landowner was denied uses which were expressly permitted under the existing zoning and general plan and was told all of a sudden that his land was to be used for agriculture, even though it was agriculturally impaired.⁷ Yet, this Court sent the owner back to the very officials who thus evaded the existing land use regulations, to plead with them to permit some other use, even though these officials evidently refuse to entertain further applications. One is baffled as to what was meant, because the Court alluded to the owner's plan as "exceedingly grandiose" (*MacDonald*, 106 S.Ct. at 2569, fn. 9). Respectfully, there was simply nothing in *MacDonald* suggesting anything other than an ordinary suburban subdivision for a middle-class, college town. One is simply baffled as to how that could have been viewed as grandiose at all, much less "exceedingly grandiose."

The purpose of these observations is not to quarrel with what the Court may have said in *MacDonald*; that much is now history. We seek rather to illustrate the prevailing confusion. If a would-be builder of an ordinary, suburban housing subdivision can be denied land uses expressly permitted by both the local zoning and the local general plan, because his project which is precisely in line with such zoning and plan is disparaged as "exceedingly grandiose," then what in the world is he supposed to do? What sort of improvements is he supposed to propose on land

⁷ As this Court astutely noted in *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 267, (1977), a sudden zoning change in response to a land use application is persuasive evidence of unwholesome municipal motivation.

zoned for single family residential use, and which is "agriculturally impaired"??

The blunt fact is that recent ad hoc procedural developments have provided little precedential guidance. They continue to provide incentives to continuous litigation, as both sides to this durable controversy now increasingly engage in procedural maneuverings in addition to searching for substantive precedent. This has created at least as many problems as it was supposed to solve.

As the weary ranks of contenders approach this Court for the fifth time in about as many years, it becomes appropriate to make a plea in the lay, not legal, sense: Please, Your Honors, this time give us some rules that will illuminate the law, not just this one case; rules that lawyers can explain to clients; rules that clients can readily apply to their affairs; and above all, rules that do not require endless litigation, first before hostile regulatory agencies, and then in two court systems.

A. Recent Procedural Requirements Are Unreasonably Burdensome Even to Experienced Developers, Economically Infeasible For All But The Wealthiest Parties, And Literally Impossible to Comply With by Ordinary Landowners.

It is critical and yet most difficult to understand what in pragmatic terms the Court meant when in *MacDonald* it said that a court "cannot determine whether a municipality has failed to provide 'just compensation' until it knows what, if any, compensation the responsible administrative body intends to provide" (106 S.Ct. at 2566-2567 emphasis added). The problem is that the "responsible administrative body" inherently has neither the intention, nor the power, nor — most importantly, the funds — to provide

compensation. A zoning body regulates; it does not compensate. It is unrealistic even to suppose that a zoning body conceives of itself as a land acquisition agency! A planning commission simply lacks the expertise, personnel and — above all else — the appropriations to pay landowners for severe land regulation. To do so would require enabling legislation. (see *City of Kansas City v. Kindle*, 446 S.W.2d 807 (Mo. 1969) for a rare example of a law authorizing such compensation). Absent such pre-existing legal authorization — to say nothing of appropriations — a municipal planning department cannot just offer compensation to regulated landowners.

The same is true with regard to nonmonetary benefits such as, for example, transferable development rights (TDRs) alluded to by this Court in *MacDonald*, *supra*. Indeed, *MacDonald* recognizes that in the *Penn Central* case cited there, the basis for use of TDRs was a comprehensive pre-existing legislative scheme regulating historical landmarks throughout New York City, and authorizing an orderly transfer of development rights accordingly. Even in New York, a city official cannot just willy-nilly offer a landowner some TDRs in exchange for his impaired property rights; see, *Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587, 350 N.E.2d 381, 388 (N.Y. 1976). In short, providing compensation as part of a regulatory scheme, is a separate, complex matter requiring enactment of novel enabling and governing legislation (and even that subject to the strictures voiced in *Fred F. French*, *supra*).

Absent such legislation, to tell a landowner deprived of reasonable use of his land, that he must go back, hat in hand, to the very people who wronged him, and beseech them for "compensation" which they have neither the inclination nor the authority to provide, or that he has to keep resubmitting alternative development plans at ruinous

cost,⁸ only to have the regulators reply in effect: "Nope. We don't like this one either," is not unlike Marie Antoinette's notorious advice to starving Parisians that when bereft of bread they should eat cake.

If indeed the Court really means to permit all that to harden into precedent, then simple fairness, to say nothing of efficiency, would counsel at the very least the adoption of a rule imposing a duty on the regulatory entity to give the landowner some advance indication of the general uses which will be permitted, so that his (and the regulatory body's) time, effort and resources will not be wasted pursuing uses that the agency has no intention of allowing. See *Spears v. Berle*, 48 N.Y.2d 254, 263, fn. 4, 397 N.E.2d 1304, 1308, fn. 4 (1979). Without some safeguard of that nature, property ownership is reduced from a constitutionally secured right to a game of governmental whim.

That is no hyperbole; unrestrained by any discipline imposed by law, municipalities with "anti-growth" constituencies are resorting to politically popular caprice in dealing with development applications; see e.g., Wessel, *Towering Troubles: Finishing a High-Rise In Boston Takes Time and Sheer Persistence*, *The Wall St. Jour.*, Jun. 5, 1986, p. 1 (while we respectfully urge the Court to read the entire article, its contents are aptly captured by its subheadings which we quote here: *Returning to Drawing Board Sometimes Isn't Enough*, *New England Life Learns*, and *Building-Bashing in Back Bay*).

Boston hardly has a monopoly on such municipal antics. In San Francisco, after nearly a year of operation of a new regulation scheme, the city has refused to approve so much as a single major new building, offering as "reasons," that

⁸ Please see the Amicus Curiae Brief of Donald and Bonnie Agins; they had to spend \$560,000 to obtain approval for a mere three lots, only to have the city declare a moratorium preventing any construction. What — at long last — must these people do to get a court of justice to hear their case on the merits?

the proposed buildings were not "architecturally superior," or that "the city has more than adequate space at this time"; see Myers, *San Francisco Limit Gets Cheers, Jeers*, The Los Angeles Times, Aug. 3, 1986, Part VIII, p. 2. How, in the face of such "reasons," can a landowner overcome the municipal ukase? What must he do to satisfy the courts that he has gone as far as he can? How many major buildings must he design before the courts will say "enough"? At what cost? How does he come up with a "superior" building in every case? (While comedic side-lights were likely unintended, the "superior" criterion does remind one of the noted public radio program "The Prairie Home Companion" whose host, Garrison Keillor, regales his audiences with tales of a mythical Minnesota town of Lake Wobegon, where *all* children are above average.)

The reality of such municipal doings is no laughing matter. It has been reported that a jury in Brian Head, Utah, recently returned a substantial verdict against the town and its officials after the plaintiff-landowners submitted their development plans for approval *13 times*, only to be turned down each time! Not surprisingly, the property was foreclosed on. See Messerly, *Jury Finds Officials Abused Power: Brian Head Developers Awarded \$3.2 Million Damages*, The Los Angeles Times, Feb. 9, 1986, Part VII, p. 9. Surely, 13 submissions cannot be the legal standard to which the law would hold a citizen. But then, what is a reasonable number? Manifestly, *some* guidelines from this Court are urgently needed.

Beyond that, other problems loom. Most of the recent land use cases reaching this Court, happened to involve developers who presumably were plying their trade in a regulatory environment familiar to them and accounted for in their overhead (even so, as noted, loss of their property by foreclosure, is not uncommon — in *Williamson County* the Hamilton Bank acquired the land by foreclosure). But

developers hardly constitute the universe of landowners. It is a grave error to suppose that all plaintiffs are wealthy, sophisticated persons who can look out for themselves in a regulatory scuffle. Some are ordinary citizens who own some land (sometimes the land may be all they own).⁹ For a harsh insight into the regulatory reality for such people, see for example *Kinzli v. City of Santa Cruz*, 620 F.Supp. 609 (N.D.Cal. 1985), involving a septuagenarian farmer's widow and her children, with neither the skills nor the means to run the regulatory gauntlet; nor could she sell her land to a developer because the latter, when faced with hostile municipal land regulations, simply refused to buy. Similarly, the protagonists in *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981) were a blind, crippled music teacher and his wife. The appalling circumstances of the *Hernandez* case are described in some detail in Babcock and Siemon, *"The Zoning Game Revisited"* (1985); note that aside from the shocking facts described in the Fifth Circuit opinion, Babcock and Siemon quote the Mayor of Lafayette as saying publicly to Mrs. Hernandez: "I'm going to get you" (*Id.*, at p. 189). Also see *Kollsman v. City of Los Angeles*, 737 F.2d 830 (9th Cir. 1984), *cert. den.* 105 S.Ct. 1179 (1985), where the lawsuit outlived Mr. Kollsman, leaving his elderly widow with prospects of additional litigation likely to consume years before even reaching the "ripeness" considerations articulated by this Court in *Williamson County* and *MacDonald* (see the dissenting opinion of Reinhardt, J., 737 F.2d at 843-844). More vivid examples of ordinary citizens being caught up in a regulatory nightmare that dragged on for years while denying them — literally — the right to build even ordinary, individual family homes on lawful lots they purchased, are provided by Babcock and Siemon, *supra*, at pp. 235-54.

⁹ See e.g., *United States v. 30.64 Acres etc.*, 795 F.2d 796 (9th Cir. 1986), involving a land owner who (other than owning the subject land) was evidently indigent.

In short, the ripeness rules of *Williamson County*, *MacDonald*, or even *Agins* (see fn. 8, *supra*) in actual application put ordinary people outside the ambit of constitutional protection, because they lack the skills and the substantial financial resources needed to jump through the procedural hoops which in the current legal climate are not subject to effective judicial redress.

B. The Present Procedural Rules Fail to Weigh the Rule of Futility, as Well as Res Judicata /Collateral Estoppel Implications of *Williamson County* Which Requires Suing First in State Courts, Before Bringing Action in Federal Courts.

It is settled that a landowner is not required — as a California Court of Appeal colorfully put it in *Ogo Associates v. City of Torrance*, 37 Cal.App.3d 830, 834, 112 Cal.Rptr. 761, 763 (1974) — to pump oil from a dry hole. Where the regulation has as its evident purpose the prevention of the contemplated use, or where the hostility of the regulatory body is manifest, or where the agency cannot provide effective relief (*e.g.*, damages), the state law rules that normally require pursuit of administrative relief, are deemed inapplicable. The cases are legion, and are reflected in virtually every land use treatise; *see, e.g.*, the discussion of this topic in Kmiec, "Zoning and Planning Deskbook," sec. 7.01 (1986), Rohan, "Zoning and Land Use Controls," Vol. 7, Sec. 52.03[3], Rathkopf, "The Law of Zoning and Planning," Vol. 3, Sec. 35.02, Yokley, "Zoning Law and Practice" (4th Ed.), Vol. 4, Sec. 24-11, "California Zoning Practice," C.E.B., Sec. 12.15 (Supp. 1985). What emerges from that law is that where the administrative remedy is inadequate, the aggrieved landowner is not required to pursue it, and *a fortiori* is not

required to do so where he is being deprived of constitutional rights, the redress in that situation being judicial.

And yet, *MacDonald* appears to suggest that not only must the aggrieved landowner pursue pointless proceedings before a hostile administrative agency which has no intention of affording him relief, but moreover, even after he is turned down on grounds transparently contrived to frustrate his lawful uses of his own land (on which, by the way, he is being taxed on the premise that its value derives from its highest and best use, even as he is being denied *any* economically rational use), he must pick himself up and have another go at it until at long last it becomes apparent what use the regulatory body will allow. Only that — we are told, 106 S.Ct. at 2567 — enables a court to say that the allowed use is so restrictive as to amount to a "taking." Only then may the owner seek judicial relief, and even that in two steps: first, under *Williamson County*, sue in the state courts in inverse condemnation (provided the state allows it), and then pursue round two in the federal courts if the state courts fail to provide just compensation.

We respectfully urge that such a procedure represents exceedingly poor public policy. It is inefficient in the extreme; it consumes profligately the time and resources of the parties and of the judiciary. Why have to try the same case at least three times¹⁰ as the normal routine? Surely, the overburdened judiciary doing its best to deal with the demands of a litigious society has better things to do than to duplicate its efforts as a matter of course.

Moreover, it is difficult to perceive what would satisfy the Court as compliance with these procedural strictures. For example, *MacDonald* observed that the plaintiffs in that case were no worse off than Mr. and Mrs. *Agins* would have been had they applied for permission to build five

¹⁰ *I.e.*, once administratively (and that possibly several times); once in the state courts; and once again in federal courts.

Victorian mansions for their single-family residences (106 S.Ct. at 2569, fn. 9). With the utmost respect, if not in a posh place like Tiburon, and *a fortiori* on land that had "greater value than any other suburban property in the State of California" (see *Agins*, 447 U.S. at 258), then where in the world would one build mansions — Victorian or otherwise??!! And yet, the Court seems to disparage such land use. Why? What is one to make of that?

In short, practical people eager to comply with this Court's legal directives so they can get on with their business, find themselves confronted with uncertainties and bewildering procedural complications that make it exceedingly difficult to say what is to be done, and how their constitutional rights are to be protected.

Beyond these problems, still other obstacles loom. In states where — unlike California — the inverse condemnation remedy is available in the state courts, the landowner, under *Williamson County*, must run the administrative/regulatory gauntlet, then sue in the state courts for his "just compensation," and then — if he is unsuccessful — sue again in the federal courts. He may then be told that his case is not sufficiently "ripe", and so the game starts anew. Does the Court suppose that anyone can afford such? This is a paradise for lawyers, but a catastrophe for litigants and a needless burden for the trial courts.

But putting such considerations aside, suppose that the procedural gauntlet has been successfully run, and the landowner is now properly in federal court. What effect is to be given to the earlier adjudication of the state court? To begin with, must the owner appeal an adverse decision of a state trial court before suing in federal court, or is losing in the state trial court enough? The very premise of *Williamson County* is that until the landowner is denied "just compensation" in the state courts, he may not come to the federal courts in search of it. But what of the matters

adjudicated in the state courts? How do the preclusion rules (see *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 81-83 (1984)), apply in cases of this type? Is there *any* preclusive effect? If so, how can it square with *Williamson County*? If not, is the entire taking controversy at large *de novo* in the federal courts? Is the U.S. District Court in an ensuing 42 U.S.C. §1983 action, to sit as a reviewing tribunal? Or, are the federal courts to follow some as yet undetermined path between the Scylla and Charibdys of preclusion on one hand and the *Williamson County* double litigation requirement on the other? How can one tell? What is one to do when trying such cases?

We implore the Court to give us some insight into these problems, or, better yet, to reconsider and abort this entire over-complex, emerging scheme. This is a grossly over-litigated field as it is, and its further overlaying with procedural conundrums to be resolved in the future on a case-by-case basis, with parties who have suffered great constitutional deprivations unable to get effective relief because of yet unborn or unformed procedural strictures and refinements, would be grossly unjust, and exceedingly bad public policy.¹¹ Constitutional rights that are not enforceable in an effective fashion may as well not be in the Constitution.

A supposed "property" system in which the ostensible owner cannot tell what rights he "owns" until after he tries to exercise them, and even then only after ruinously costly, repetitive (and often pointless) administrative proceedings, and only then, after two rounds of litigation in court, is an illusion. Only the most wealthy and most determined persons can even try to vindicate their constitutional property rights under such a system.

¹¹ Regulatory entities can suffer thereby too; a landowner who ultimately prevails in such cases will necessarily present a horrendous bill under 42 U.S.C. §1988 for his litigation expenses.

As this Court astutely observed in *Willow River Power Co. v. United States*, 323 U.S. 499, 502-503 (1945), "property rights" are only those economic advantages that the law will protect. Disabling one from perceiving what the law will protect, effectively destroys the very idea of property. Bearing in mind that "property" is not the physical object but a group of rights (*see United States v. General Motors Corp.*, 323 U.S. 373, 377-378 (1945)), a dilution of such rights to the point of their practical unavailability, also accomplishes their *de facto* transfer to the government (*see Id.*, at 378). This is particularly true of the right of user;¹² if one's right to use one's own property is *de facto* gone, virtually nothing is left, save the dubious privilege of paying taxes and bearing other burdens of property ownership.

History teaches that one simply cannot expect governmental power to restrain itself; the accuracy of Lord Acton's aphorism about the corrupting effects of power¹³ has been demonstrated time and again, with depressing reliability. Thus, to provide meaningful restraints on abusive growth of governmental power, the remedy afforded to aggrieved citizens must be plain and effective, so that victims will be made whole and constitutional wrongdoers forewarned.

¹² Indeed, California statutory law defines property in terms of user; *see*, Cal. Civil Code §654.

¹³ Corruption also has another meaning in this context. It is surely subject to judicial notice that outright purchase of official favor in land use matters is a common form of municipal corruption and criminality, to say nothing of political "campaign contributions." Removal of effective remedies from the civil law, can only exacerbate that situation, because pragmatically it will place unbounded power in the hands of zoning officials.

In short, the newly created procedural rules bid fair to complicate and render uncertain — if not positively unavailable — effective remedies, while burdening the parties and the courts with excessive litigation. Remedial action by this Court is urgently needed.

II.

A RATIONAL AND FAIR SYSTEM OF REMEDIES FOR TAKINGS MUST INCLUDE JUST COMPENSATION TO BE EFFECTIVE AND SOUND.

The absolutist California dogma forbidding payment of just compensation in all cases of regulatory takings, irrespective of circumstances or of the economic impact on the aggrieved owner, is unsound. This conclusion finds support in this Court's unbroken chain of decisions dealing with remedies for takings, which reach the contrary conclusion: *Hurley v. Kincaid*, 285 U.S. 95 (1932); *Dugan v. Rank*, 372 U.S. 609 (1963); *Fresno v. California*, 372 U.S. 627 (1963); *Regional Rail Reorganization Act Cases*, 4198 U.S. 102 (1974); *Dames & Moore v. Regan*, 453 U.S. 654, 688-689 (1981); *Ruckelshaus v. Monsanto Co.*, 104 S.Ct. 2862, 2880 [8] (1984); *United States v. Riverside Bayview Homes, Inc.*, 106 S.Ct. 455, 459-460 (1985). Also, *see United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 752-753 (1950) (taking effected by a California state police power measure gives rise to right to just compensation, even though invaded right not protectible by injunction).

A. This Court's Precedential Analysis Favors Just Compensation as a Remedy For Takings.

Hurley v. Kincaid, supra, is well nigh dispositive, and answers the question whether the owner's constitutional rights are protected when just compensation is awarded, or whether the law must fall because of lack of it. The owner's grievance in such cases is not that the government takes his land, but rather that the taking has not been accompanied by compensation. It is the lack of compensation that offends the Constitution, not the taking which is an inherent power of government (*Kohl v. United States*, 1 Otto (U.S.) 367 (1876)) that exists independently of the Constitution which only imposes conditions to its exercise (*Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878)). It follows, therefore, that if compensation is provided by the courts, the flaw in the governmental action is cured, and there is no illegality (*Hurley*, 285 U.S. at 104). Accord, *United States v. Riverside Bayview Homes, Inc., supra*, 106 S.Ct. at 459-460.

B. The Notion Whereby Courts Would Have to Invalidate Legislation as The Relief of First Resort, is Unsound and Contrary to Settled Constitutional Jurisprudence.

Hurley went on to note:

"Even where the remedy at law is less clear and adequate, where large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a court of equity acts with caution and only upon a clear showing that its intervention is

necessary to prevent an irreparable injury." 285 U.S. at 104, fn. 3.

That observation puts its finger on the pertinent policy considerations: it would be improvident to require the courts as a constitutional imperative to strike down governmental programs merely because they impact on a affected property owner so as to deprive him of a "stick" in his property rights "bundle." *The Regional Rail Reorganization Act Cases, supra*, teach that lesson well. Had such a theory been applied there (as it was by the trial court, only to be reversed by this Court) the upshot would have been an instant destruction by the stroke of a judicial pen of an effective, albeit insolvent, rail transportation system, still needed by the most densely populated regions. The same is true of *Dames & Moore v. Regan, supra*. Had invalidation been used there, the executive's foreign relations power would have been impaired, to the injury of Iranian hostages. Resort to compensation, however, avoided both problems (see 453 U.S. at 689, 691).

Having the courts invalidate legislative enactments on a ongoing basis, as the primary remedy, ignores the socio-political gravity of judicial intervention in the workings of a tri-partite democratic government. See *McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819). When the judiciary invalidates a legislative enactment, it is a measure of last — not first — resort. The judicial power to invalidate is a historically rooted power of "strict necessity" (*Rescue Army v. Municipal Court*, 331 U.S. 549, 568 (1947); *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944)), and is to be invoked only when "unavoidable" (*Alma Motor Co. v. Timken-Detroit Axle Co.*, 329 U.S. 129, 136 (1946)). See *Rescue Army v. Municipal Court, supra*, 331 U.S. at 571-572.

California's approach ignores the grave strain that judicial invalidation of legislation imposes on the social fabric of a democratic society. To fashion a rule that would have the judiciary impose ongoing constraints on what the legislature may enact — not in the historical context of discrete, major policy decisions that made occasional legitimate claims on this Court's extraordinary power to invoke the grand scheme of checks and balances, but in terms of routine, day-in, day-out, case by case adjudications of purely local (usually political) decisions involving what are often insignificant patches of land — would be mistaken and improvident. It would make the judiciary an ongoing supervisor of the local legislative branch.

It seems by far the better policy to let the local legislators legislate, and when they disregard the "just compensation" clause,¹⁴ and work a taking, it is singularly appropriate that they should be called upon to face up to the economic consequences of their own informed decision making, and to pay for that which their solemn action took from a private owner. See *San Diego, supra*, 450 U.S. at 656-657; *U.S. Trust Co. v. New Jersey*, 431 U.S. 1 at 29, fn. 27 (1977). In the long run, that approach is certain to enhance the quality of legislative cost/benefit analyses, and to provide incentives to local governmental entities' clear recognition of the distinction between municipal necessities, social amenities, and outright luxuries. See *U.S. Trust Co. v. New Jersey, supra*, 431 U.S. at 29-31.

Land use planners, the same as all other public functionaries, are sworn to obey the Constitution and must be accountable for their refusal to do so. As Mr. Justice Brennan put it: "After all, if a policeman must know the Constitution, they why not a planner?", *San Diego*, 450

¹⁴ Elaborate procedural safeguards assure that regulatory entities are clearly put on notice by the owner's applications and protests that his rights are being impaired by the regulation, and hence that the Constitution is being disregarded rather than overlooked.

U.S. at 661, fn. 26 (Brennan, J., dissenting). Why not, indeed?¹⁵

C. Availability of The Just Compensation Remedy Makes Judicial Response to Takings More Capable of Doing Individual Justice to Both The Aggrieved Citizen and The Government.

There are additional sound reasons that favor just compensation as an available remedy. If the regulating entity effects a taking, it has several ameliorating options available to it. It can, for example, amend the regulation so as to avoid the continuing constitutional violation, while preserving its proper regulatory objectives to an optimal degree. See *San Diego, supra*, 450 U.S. at 656-660 (Brennan, J., dissenting). In such cases, this reduces liability to compensation for a temporary or partial taking. Moreover, insurance may be available; see *City of Mill Valley v. Transamerica Ins. Co.*, 98 Cal.App.3d 595, 159, Cal.Rptr. 635 (1979).

Even assuming the worst possible scenario from the regulating entity's point of view (*i.e.*, those situations where the invasion of private property rights is so egregious as to work a complete taking), the municipality does not lose money, but rather acquires a valuable asset at a fair price. And if the asset thus acquired is indeed beyond its means, it has the option of selling it. See fn. 19, *infra*.

It should go without saying that a finding of "taking" does not mean that the taking entity must acquire the full fee simple title to the property in question. What has been taken depends on the facts of each case; it may be a

¹⁵ See *Corrigan v. City of Scottsdale*, 720 P.2d 513, 518[1] (Ariz. 1986).

temporary taking,¹⁶ a partial taking of only a limited property interest,¹⁷ or, if the circumstances are egregious enough it may be a full taking.¹⁸

Compensation further provides proper incentives and disincentives to municipal fine tuning of regulations so as to meet the desirable goals of accomplishment of basic regulatory objectives (albeit possibly not to the degree that may be desired by community environmentalist zealots; see Frieden, "The Environmental Protection Hustle" (1979, MIT Press), passim), while still affording protection to the rights of the regulated (see *U.S. Trust Co. v. New Jersey*, supra, 431 U.S. at 29-30). In contrast, the no-compensation approach encourages an irresponsible governmental entity to try confiscatory regulation, without fear of meaningful adverse consequences. That would be a positive disincentive to responsible governmental conduct. See, *Corrigan v. City of Scottsdale*, supra, 720 P.2d at 517-518, fn. 2 and the accompanying text.

¹⁶ *Lomarch Corp. v. City of Englewood*, 237 A.2d 81 (N.J. 1968) — regulation deemed a taking of one-year option to buy. *Keystone Associates v. State*, 371 N.Y.S.2d 814 (Ct. Cl. 1975) rev'd. 389 N.Y.S.2d 895 (App. Div. 2976), rev'd. and remanded 45 N.Y.2d 894, 383 N.E.2d 560 (N.Y. 1978) — regulation worked temporary taking. *Gordon v. City of Warren*, 579 F.2d 386, 387 (6th Cir. 1978) — temporary taking. *Jones v. People*, 22 Cal.3d 144, 148 Cal.Rptr. 640, 583 P.2d 165 (1978) — regulation worked temporary taking of access. *City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978) — regulatory activity worked a temporary taking; out-of-pocket losses compensated. Accord, *San Antonio River Authority v. Garret Bros.*, 528 S.W.2d 266 (Tex. Civ. App. 1975)

¹⁷ *Sneed v. County of Riverside*, 218 Cal.App.2d 205, 32 Cal.Rptr. 318 (1963) — regulation effected taking of easement.

¹⁸ *Benenson v. United States*, 548 F.2d 939 (Ct. Cl. 1977).

D. Just Compensation Needs to be Retained as a Remedy Because Invalidation is Often Ineffective and is *De Facto* Not Available in California.

Extremely few jurisdictions follow the rule whereby courts order that the landowner be allowed to proceed with his project upon a showing that the challenged regulation is invalid (see e.g., *Sinclair Pipeline Co. v. Village of Richton Park*, 167 N.E.2d 406, 411 (Ill. 1960). This approach gives rise to separation of powers problems; see Kratovil, *Eminent Domain Revisited and Some Land Use Problems*, 34 De Paul L. Rev. 587, 613-614 (1985). In any event, California is not one of those jurisdictions. Not only does invalidation in California mean that the supposed "victor" has to face his adversaries as adjudicators on remand, but that state's law goes even further. It grants the regulatory agency a carte blanche simply to change the regulation at any time, even while its validity is being litigated, or even after it has been found invalid. See *San Diego*, 450 U.S. at 655, fn. 22, Brennan, J., dissenting. Thus, this remedy is simply not effective in California.

III.

MR. JUSTICE BRENNAN'S VIEWS IN SAN DIEGO GAS & ELECTRIC CO. HAVE BEEN WIDELY ACCLAIMED, AND FORM A DESIRABLE BLUEPRINT FOR SOLUTION OF THE ISSUE BEFORE THE COURT.

There is little that can be added to the above heading. The response of the courts of appeals speaks for itself. So far, the Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh

Circuits have expressly opted to follow the views articulated in the *San Diego* Brennan opinion: *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981), *Devines v. Maier*, 665 F.2d 138, 142, (7th Cir. 1981), *Barbian v. Panagis*, 694 F.2d 467, 482, fn. 5 (7th Cir. 1982), *In re Aircrash in Bali*, 684 F.2d 1301, 1311, fn. 7 (9th Cir. 1982), *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1148 (9th Cir. 1983), *Fountain v. Metro Atlanta-Rapid Transit Dist.*, 678 F.2d 1038, 1043 (11th Cir. 1982), *Nemmers v. City of Dubuque*, 764 F.2d 502, 505, n. 2 (8th Cir. 1985), *Hamilton Bank v. Williamson County, etc., Comm'n.*, 729 F.2d 402, 408 (6th Cir. 1984), *rev'd on other grounds*, 105 S.Ct. 3108 (1985). To the same effect, *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. 1981), endorsing the 42 U.S.C. §1983 damages remedy for temporary denial of use of the subject property under a local confiscatory land use regulation. Also see *Gordon v. City of Warren*, 579 F.2d 386 (6th Cir. 1978). Only the First Circuit adheres to the lonely and concededly problem-ridden position that non-monetary relief is the sole remedy: *Pamel Corp. v. Puerto Rico Highway Auth.*, 621 F.2d 33 (1st Cir. 1980).¹⁹

Similarly, in the short time since their articulation, the *San Diego Gas & Electric Co.* substantive views have commanded a following among state courts; see e.g., *Corrigan v. City of Scottsdale*, 720 P.2d 513 (Ariz. 1986); *Burrows v. City of Keene*, 432, A.2d 15, (N.H. 1981); *Zinn v. State*, 334 N.W.2d 67, 72-73 (Wis. 1983); *Rippley v.*

¹⁹ *Pamel* was decided without benefit of *San Diego*, and the views expressed there are dictum, the holding being that the plaintiff failed to allege any causal connection between the defendant and the wrongful act (see 621 F.2d at 36[4]). In *Citadel Corp. v. Puerto Rico Highway Auth.*, 695 F.2d 31, 33-34, fn. 4 (1st Cir. 1982), the First Circuit candidly expressed doubt about the soundness of its *Pamel* views in light of *San Diego*, but avoided the problem by resting the decision on Eleventh Amendment grounds, the defendant in *Citadel* being the Commonwealth of Puerto Rico.

City of Lincoln, 330 N.W.2d 505, 511 (N.D. 1983); *Annicelli v. Town of Kingston*, 463 A.2d 133, 140 (R.I. 1983); also see *Pioneer Land & Gravel v. Anchorage*, 627 P.2d 651 (Alaska 1981).

The persuasive influence of Mr. Justice Brennan's views in *San Diego Gas & Electric Co.*, is particularly noteworthy because it posed no precedential compulsion. Yet, those views have been so often adopted by so many courts because they are plainly right. Under that approach the rights of all parties are protected:

(a) The regulatory entity need not fear that its important policies will be frustrated against its will.

(b) The regulatory entity gets to opt for acquisition of an appropriate property right in the regulated land, or for retreat from its overly ambitious regulatory scheme.²⁰

(c) The landowner is assured of ability to proceed with some economically rational use of his land, and is recompensed only to the extent of demonstrable losses suffered.

(d) The regulatory entity is put on notice that its actions have constitutional consequences, and that — at least beyond a certain point — there is no such thing as a free lunch.

²⁰ An excellent example is provided by the Willard Hotel in Washington. After its acquisition by inverse condemnation (see *Benenson v. United States*, 548 F.2d 939 (Ct. Cl. 1977)) it was recently redeveloped by private entities which evidently acquired their interest from the government.

CONCLUSION

There is an urgent need for the Court to address on the merits the issue which has eluded it in four successive cases: may a state disregard the "just compensation" command of the Fifth Amendment, and deny any compensation to an owner whose property has been *de facto* taken by excessive regulations that deny all *reasonable* use of the land?

Because the Court has dealt with the issue of remedies several times in the context of federal takings, and since the time of *Hurley v. Kincaid* has each time opted for availability of "just compensation," the pertinent legal doctrines and public policies are well developed, and no reason appears why they should not apply to takings by local governments as well. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) makes clear that this would be wholly consistent with general law of remedies.

Equally important, this amicus respectfully but strenuously urges that the newly minted procedural rules be re-examined, and substantially modified so as to avoid the presently emerging, costly, unpredictable, complex, repetitive and wasteful system of litigation, to say nothing of the injustice that perforce flows from it.

Amicus respectfully urges that the judgment below be reversed, and the cause remanded for a trial on the merits.

Respectfully submitted,

Gideon Kanner

Attorney for Amicus Curiae
California Building Industry
Association

AMICUS CURIAE

BRIEF

No. 85 - 1199

Supreme Court, U.S.

FILED

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CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

**FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH
OF GLENDALE, A CALIFORNIA CORPORATION,**

Appellant,

v.

COUNTY OF LOS ANGELES, CALIFORNIA,

Appellee.

**On Appeal from the Court of Appeal of California
Second Appellate District, Division Seven**

**BRIEF OF AMICUS CURIAE
NATIONAL ASSOCIATION OF REALTORS®
IN SUPPORT OF APPELLANT**

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IN THE

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 OF GLENDALE, A CALIFORNIA CORPORATION,**

Appellant,

v.

COUNTY OF LOS ANGELES, CALIFORNIA,

Appellee.

**On Appeal from the Court of Appeal of California
 Second Appellate District, Division Seven**

**BRIEF OF AMICUS CURIAE
 NATIONAL ASSOCIATION OF REALTORS®
 IN SUPPORT OF APPELLANT***

IDENTITY OF AMICUS

The NATIONAL ASSOCIATION OF REALTORS® (hereinafter "NAR") is a not-for-profit professional association comprised of over 650,000 persons engaged in all phases of the real estate business.

* All parties of record in this case have consented pursuant to Supreme Court Rule 36.2 to the filing of this amicus curiae brief in support of Appellants. These consents are filed herewith.

NAR was created in 1908 to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property and to advance professional competence in the rendition of real estate services.

NAR includes among its members real estate brokers, managers, appraisers, counselors and a variety of other participants in the residential, commercial, industrial, farm and investment real estate markets. Through its many programs and the programs of its affiliated Institutes, Societies and Councils, NAR has been involved in and committed to the solution of every significant problem encountered by property owners for three quarters of this century. Through its long and undeviating commitment to the protection of the property owner and his rights and interests in his property, NAR has earned the right to speak not only for the real estate industry but for the American property owner.

Of the problems which have concerned NAR, few if any have been more fundamental or of greater importance than the preservation of private property rights as established by the United States Constitution. This commitment to private property rights is the cornerstone of NAR, for without such rights there would be no ownership, development, transfer, or enjoyment of real estate.

INTEREST OF AMICUS

The impact of the issue presented in this case should not be perceived as limited solely to the application of a county ordinance to a peaceful mountain retreat owned by a church in Southern California. The issues implicated by this case, although raised by the rule of law established

by the California Supreme Court in *Agins v. City of Tiburon*, 24 Cal. 3d 266, 598 P. 2d 25 (1979), *aff'd on other grounds* 447 U.S. 255 (1980), reach beyond the boundaries of that state to every parcel of property owned privately in this country. At stake is the protection afforded all property owners by the fifth and fourteenth amendments to the United States Constitution against the uncompensated "taking" of their property rights and the benefits of land ownership.

The historical and substantial commitment of NAR to the preservation of private property rights mandates its attention to the threat presented by this rule of law to property owners and property ownership across the entire country including California.

NAR believe it is uniquely positioned to perceive the seriousness of this threat. Not only does its membership span the entire nation, but these members are involved in upwards of 80% of real property resale transactions. This comprehensive involvement at the grassroots level of land development, investment and sale provides NAR with a direct and unobstructed view of the negative impact regulatory actions such as the one at issue here will have on the exercise of Constitutionally protected property rights.

NAR does not propose herein to duplicate the legal arguments presented in Appellant's Brief. Rather, NAR endorses and urges to this Court these arguments. Further, to avoid unnecessary repetition, NAR adopts the statement of the case set forth at length in Appellant's Brief. The purpose of NAR in submitting this brief *amicus curiae* is to add the collective voices of the hundreds of thousands of NAR members and the millions of American property owners they serve to the chorus of other property owners concerned with the unreasonable, intolerable

and unconstitutional limitations which the decision of the court below and the *Agins* rule impose upon the rights of private property guaranteed by the Constitution.

INTRODUCTION

This case involves the fundamental Constitutional right of private property ownership. We seek reversal of the decision below and invalidation of the decision of the California Supreme Court in *Agins v. City of Tiburon*, 24 Cal. 3d 266, 598 P. 2d 25 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980), which tramples upon that right.

In order to advance certain public policy objectives described in its opinion, the California Supreme Court held in *Agins v. City of Tiburon* that a property owner may not "sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid." 24 Cal. 3d at 273. The principal question *Agins* poses is whether the Just Compensation Clause of the fifth amendment¹ permits a state to deny a property owner just compensation for the taking of his property. *Agins* also poses the question whether regulatory action may *ever* constitute a taking for which the fifth amendment requires compensation.

The importance of these questions can hardly be overstated. Without question, those rights are subject to the police powers and the power of eminent domain of governments at all levels. Yet *Agins* stretches those powers beyond rational bounds, and gives government the ability

¹ The Just Compensation Clause of the fifth amendment provides "[N]or shall private property be taken for public use, without just compensation."

to sweep away property rights by regulatory fiat, without regard to the investment of the owners or the just and fair treatment the Constitution requires. Elimination of a remedy necessary to protect property rights from being subject to confiscation by governmental whim makes those rights meaningless.

Three times² this Court has been presented with these questions, but in each case it has concluded that the property owners had not suffered a taking of their property which was sufficiently final to permit consideration of the issues and correction of the *Agins* result.

The present case, which does involve a final taking and thus does not contain the infirmity of prior cases, again raises the Constitutional validity of the holding in *Agins*. For the reasons set forth herein, NAR urges the Court to hold unequivocally that a taking of private property within the meaning of the fifth amendment may be effected by governmental regulatory action, and that in the event of such a taking, a state may not deny the property owner an opportunity to seek and be awarded just compensation for the taking of his property.

NAR believes this result can be reached without a Constitutional quantum leap from existing fifth amendment jurisprudence. Prior decisions of this Court have repeatedly acknowledged that regulatory action short of formal condemnation may result in an unconstitutional taking of private property unless just compensation is provided. Furthermore, the *Agins* rule, which prohibits a suit for compensation and permits only a judicial declaration that a regulation is an invalid "taking," cannot be reconciled

² *MacDonald, Sommer and Frates v. County of Yolo*, 106 S. Ct. 2561 (1986); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson County*, 105 S. Ct. 3108 (1985); *San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621 (1981).

with prior decisions of this Court construing the fifth amendment's Just Compensation Clause. Thus, the California Supreme Court's holding in *Agin*s must be declared Constitutionally impermissible.

Whatever the objectives to be served by the *Agin*s rule, those objectives may not be achieved at the expense of the Constitutional guarantee that property not be taken without payment of just compensation. Reasonable interpretations of fifth amendment "taking" jurisprudence will permit local governments exercising prudence, care and reasoned dispatch to continue to utilize their police powers to regulate private property without undue exposure to liability for large, unforeseen compensation obligations to property owners.

ARGUMENT

I.

GOVERNMENT REGULATORY ACTION MAY CONSTITUTE A TAKING WITHIN THE MEANING OF THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT.

The California Supreme Court's decision in *Agin*s injected uncertainty, if not chaos, into prior understanding of the mandate of the Just Compensation Clause in two respects. Not only did the decision establish a novel rule which insulates governments from paying compensation to property owners for certain regulatory takings of private property,³ but it also cast doubt on whether there

³ A "regulatory taking," as used herein, may be defined as a deprivation of some or all of the owner's rights to use and enjoy the property, implemented as a result of administrative or

(Footnote continued on following page)

is any form of regulation which can constitute a taking within the meaning of the Just Compensation Clause. This implication of the *Agin*s decision was noted by Justice Brennan in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), where, in his oft-quoted dissent, he concluded that it is "clear that the California Supreme Court has held that California courts in a challenge . . . to a police power regulation, are barred from holding that a fifth amendment 'taking' requiring just compensation has occurred." *Id.*, at 642.

That interpretation of *Agin*s was left unclarified in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson County*, 105 S. Ct. 3108 (1985), where petitioners advanced the thesis that a government regulation which is so restrictive as to deny a property owner all reasonable beneficial use of its property should not be viewed as a taking. Rather, petitioners asserted, such action is an unduly oppressive use of the police power in violation of the Fourteenth Amendment's Due Process Clause, which need not be remedied by "just compensation." While noting that it had left that issue undecided both in *Agin*s and in *San Diego Gas & Electric*, this Court was willing to assume, albeit for purposes of argument, that a regulation which "goes too far" may constitute a taking under the Just Compensation Clause.⁴

More recently, this Court has viewed the *Agin*s result as presenting only the question of whether compensation

³ continued
legislative government action. It may be contrasted with an outright acquisition of the property by exercise of the power of eminent domain.

⁴ The issue remained unsettled, since this Court again avoided consideration of *Agin*s when it found that the property owners had failed to pursue all available methods of obtaining permission to develop the property as intended or in a less comprehensive fashion.

is a necessary remedy to a regulatory taking. In a holding based explicitly on *Agins*, the California Court of Appeal held that a property owner could not maintain a cause of action seeking compensation for an alleged taking of property resulting from the denial of the right to develop property in a certain fashion. *MacDonald, Sommer & Frates v. County of Yolo*, 106 S. Ct. 2561 (1986). On appeal, this Court noted probable jurisdiction “[B]ecause of the importance of the question whether a monetary remedy in inverse condemnation is constitutionally required in appropriate cases involving regulatory takings.” *Id.*, 106 S. Ct. at 2566. Significantly, that language acknowledges that this Court noted probable jurisdiction in an explicit attempt to confront the remedial issue. Whether compensation is mandated by the Just Compensation Clause is a question that only exists if regulatory takings are cognizable under the Just Compensation Clause. Thus, though the Court did not resolve the compensation issue which it had identified as that posed by *MacDonald*,⁵ its acceptance of the case necessarily presumes that property may be taken within the meaning of the Just Compensation Clause by governmental regulatory action.

That presumption is hardly surprising, however, in light of prior statements and conclusions of the Court. In *Agins*, in fact, the general circumstances in which a regulatory taking may be found were noted:

The application of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928), or denies an owner economically viable use of his land,

⁵ The Court again held that the impact of the regulatory scheme and its application to the proposed development was insufficiently final to permit it to reach the issue presented.

see *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 138, n. 36 (1978). The determination that government action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest.

447 U.S. at 260.

The Court again acknowledged that governmental action adversely impacting the right and opportunity of property owners to use their property may effect a taking under the fifth amendment in *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984), and, relying on earlier cases, went so far as to point to factors that “should be taken into account when determining whether a government action has gone beyond ‘regulation’ and effects a ‘taking,’” 467 U.S. at 1005. *Accord*, *United States v. Riverside Bayview Homes*, 106 S. Ct. 455, 459 (1985) (“We have frequently suggested that governmental land-use regulations may under extreme circumstances amount to a ‘taking’ of the affected property”); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 296 (1980); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979); *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 127 (1978); (“[A] use restriction on real property may constitute a ‘taking’ if not reasonably necessary to the effectuation of a substantial public purpose . . . or perhaps if it has an unduly harsh impact upon the owner’s use of the property.”); *United States v. Causby*, 328 U.S. 256 (1946).

In sum, despite the facial ambiguity in the language of the *Williamson County* decision, this Court has repeatedly recognized the viability of a claim that governmental regulatory action may, under certain circumstances, result

in a "taking" of property within the meaning of the Just Compensation Clause. NAR therefore urges the Court to declare explicitly that action which, as in this case, denies the property owner any reasonable opportunity for viable use of his property without compensation being paid to the owner, violates the fifth amendment to the Constitution.

II.

A STATE MAY NOT DENY A PROPERTY OWNER THE OPPORTUNITY TO SEEK JUST COMPENSATION FOR THE TAKING OF PRIVATE PROPERTY BY REGULATORY ACTION.

In a conclusion based squarely on *Agins*, the Court of Appeal below affirmed dismissal of Appellant's first cause of action "because the United States Supreme Court has not yet ruled on the question of whether a state may constitutionally limit the remedy for a taking to non-monetary relief," *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, No. B003702, slip op. at 16 (Cal. Ct. App. June 25, 1985). American property owners, whose rights are jeopardized by that unanswered question now before this Court, need that answer. Analysis of the *Agins* rule limiting the remedy for regulatory takings to mandamus and declaratory relief demonstrates that it cannot be reconciled with prior decisions of the Court requiring payment of compensation for temporary takings. Thus, the question noted by the Court of Appeal must be answered in the negative, and its ruling reversed.

A. The Affect of the *Agins* Rule is to Preclude Property Owners from Obtaining Compensation for Temporary Takings of Their Property.

In *Agins* the California Supreme Court rejected the possibility of a property owner's suit in "inverse condemnation," i.e., a suit for compensation for the taking of property as a result of government imposed limitations on development or use of the property. Instead, the owner is relegated to pursue relief only by way of mandamus and declaratory judgment, seeking a declaration that the regulation in question is invalid and may not be applied because it takes the property without the payment of just compensation required by the fifth amendment.

Application of the *Agins* rule thus contemplates that a California property owner who believes his property has been "taken" within the meaning of the Just Compensation Clause will proceed to seek a judicial declaration that the regulation or ordinance effectuating that taking is unconstitutional because no compensation was provided. If the owner is successful, the regulation is pronounced invalid and application thereof proscribed, and the property owner is again free to use the property as he desires.⁶ Thus, the net result is that the property owner has lost the right to use his property freely for a period beginning with the application of the regulation and ending with the declaration of invalidity.

Under the foregoing scenario, therefore, notwithstanding the fifth amendment's prohibition against the taking of private property without just compensation, the property owner suffers the loss of the use of his property for an

⁶ If he is unsuccessful, of course, the regulation is not unconstitutional as not effectuating a "taking," and no compensation is due in any event. Determination of the circumstances when a regulation does or does not constitute a taking is a question not presented by this case.

interim period without having received compensation therefor. Precisely as in the present case, however, *Agins* operates to preclude him from instituting litigation to recover the just compensation to which he is entitled. Thus, because the *Agins* rule bars property owners in California from obtaining compensation when the government fails to provide it of its own accord, the rule directly conflicts with the Just Compensation Clause if that Constitutional provision requires payment for takings which are only temporary in duration.

B. The Fifth Amendment Requires that Property Owners Be Compensated for Takings of Their Property Which Are Temporary.

The Just Compensation Clause is without any temporal qualification, and includes no proviso permitting government to compensate owners of property taken for public use only if the property is taken permanently, rather than temporarily. The language of the Constitutional compensation requirement does not support, or even suggest, that no compensation is due for governmental takings which are only for a limited period of time.

Because there is no textual Constitutional basis for denying compensation to owners whose property is taken only temporarily, it is not surprising that prior decisions of this Court firmly establish that compensation must be provided for temporary as well as permanent takings. In a series of cases arising out of various extraordinary government needs during the second World War, the Court reviewed the proper measure of compensation to be awarded for the taking of property for government purposes for limited, finite periods. *United States v. Westinghouse Electric & Manufacturing Company*, 339 U.S. 261 (1950); *United States v. Petty Motor Company*, 327 U.S. 372 (1946); *United States v. General Motors Cor-*

poration, 323 U.S. 373 (1945). Though the question posed in each of those cases was whether the manner in which the compensation for those takings had been measured properly, the fundamental underlying premise in each decision is that the owners were entitled under the Just Compensation Clause to be compensated for the temporary denial of the right to their property. In particular, in *United States v. General Motors Corporation*, the Court fashioned its analysis of the "justness" of the compensation on the realization that a continuous sequence of temporary takings could result in a *de facto* permanent taking. Thus, the owner was entitled to compensation for each temporary taking in order, in part, to prevent the government from dramatically reducing the amount of compensation which would be due otherwise for one that was permanent. *Id.*, 323 U.S. at 382.

Similarly, the Court held an award of compensation necessary where government activity (operation of an airport) establishing a taking was scheduled to continue for only a one-year period with a provision for additional renewal periods. *United States v. Causby*, 328 U.S. 256 (1946). Although remanding the case for appropriate determination of whether the compensation award had been proper in view of the suggestion that the amount of the award may differ if the taking were permanent rather than temporary, the Court left no doubt that compensation was required for the taking of the property for only a temporary period. *See also, Kimball Laundry Company v. United States*, 338 U.S. 1 (1949).

Moreover, the principle that compensation must be paid for temporary as well as permanent takings is further exemplified by cases identifying the "act of taking (as the) event which gives rise to the claim for compensation and fixes the date as of which the land is to be valued" *United States v. Dow*, 357 U.S. 17, 22 (1958). "[A] land-

owner is entitled to bring such an action (for compensation) as a result of the *self-executing character of the provision with respect to compensation . . .*" *United States v. Clarke*, 445 U.S. 253, 257 (1980) (emphasis added); *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1 (1984); See also, *United States v. Dickinson*, 331 U.S. 745 (1947); *United States v. Miller*, 317 U.S. 369 (1943).

Thus, this Court has laid to rest any uncertainty that governmental takings of private property require compensation only when of permanent duration. Under the Just Compensation Clause, a taking for a limited period requires compensation to be paid to the property owner just as surely as where the owner is forever divested of the right to use and enjoy his property. As a direct consequence of that requirement, the *Agins* rule clashes with the fifth amendment, and must therefore yield.

The same result is reached by a careful reading of this Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson County*, 105 S. Ct. 3108 (1985) even though the Court was unable to reach the merits of that case. There, the Court recognized that

"(The) Fifth Amendment (does not) require that just compensation be paid in advance of, or contemporaneously with, the taking; *all that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' . . . exist at the time of the taking.* (citations omitted) [I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."

105 S. Ct. at 3121 (emphasis added).

Because a temporary taking, such as that imposed prior to the time the property owner obtains a judicial declaration that an unduly restrictive regulation is Constitutionally infirm for failure to provide compensation, is a taking nonetheless, the Fifth Amendment requires a "reasonable, certain and adequate provision for obtaining compensation," *Id.* In sharp contrast, the *Agins* rule wholly eliminates any opportunity for the property owner to obtain the compensation due for the temporary taking of his property. Thus, *Agins* flies squarely in the face of the requirements of the fifth amendment, and the rule of California law thereby established must be declared unconstitutional.

III.

INVALIDATION OF THE AGINS RULE WILL NOT RESULT IN UNDUE EXPOSURE OF STATE AND LOCAL GOVERNMENTS.

Judicial and scholarly comment supporting the *Agins* rule has advanced the argument that such a rule is necessary to protect state and local governments from exposure to potentially large and calamitous liability for compensation resulting from temporary regulatory takings. *Agins v. City of Tiburon*, 24 Cal. 3d 266, 598 P. 2d 75 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980); Williams, Smith, Siemon, Mandelker and Babcock, *The White River Junction Manifesto*, 9 Vt. L. Rev. 193 (1984). To be sure, such exposure may well give governments pause for reflection and careful analysis in exercising their police powers to regulate private property use. But, as this Court has recognized, regulatory forethought is inherently the responsibility of government officials. "[T]he municipality's liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decision-maker would be derelict in his duties if,

at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury." *Owen v. City of Independence*, 445 U.S. 622, 656 (1980).

Thus, elimination of the *Agins* rule is necessary not only to correctly implement this Court's interpretation of the Constitutional guarantees provided property owners under the Just Compensation Clause, but also to cause government officials to discharge their responsibilities in a manner that affords proper respect for those guarantees. "[T]he knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbour doubts about the lawfulness of their intended actions to err on the side of protecting constitutional rights." *Id.*, at 651-52.

Moreover, although Constitutional rights may not be sacrificed in order to pursue policy objectives, NAR also believes that the state and local government fisc will not be placed in mortal jeopardy by invalidation of *Agins*. This is for two principal reasons.

First, it is simply untrue that governments will be wholly unable to ascertain whether any given regulatory scheme will result in a "taking." Although "[T]he question of what constitutes a 'taking' for Fifth Amendment purposes has proved to be a problem of considerable difficulty," *Penn Central*, 438 U.S. at 123, and no "set formula" has been established, *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962); See also, *MacDonald, Sommer & Frates v. County of Yolo*, 106 S. Ct. at 2566; *Penn Central*, 438 U.S. at 124, factors such as "the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental ac-

tion . . . have particular significance." *Kaiser Aetna v. United States*, 444 U.S. at 175. This Court has also indicated that only when "the effect . . . is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred." *United States v. Riverside Bayview Homes, Inc.*, 106 S. Ct. at 459 (1985).

Viewed from the perspective of what does *not* constitute a taking, "mere fluctuations in value during the process of governmental decision-making does not result in a taking," *Agins*, 24 Cal. 3d at 263, n.9; *Penn Central*, 438 U.S. at 131. Prior rulings of the Court in a variety of factual circumstances provide further guidance as to the nature of regulation which does, and does not, constitute a taking. See, e.g., *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984); *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Andrus v. Allard*, 444 U.S. 51 (1979); *Armstrong v. United States*, 364 U.S. 40 (1960); *United States v. Causby*, 328 U.S. 250 (1945).

Indeed, it is perhaps the regulating government itself which is best able to assess the impact of proposed regulation on property rights and ascertain whether it will effectuate a taking. The government may articulate the intent of and the need and basis for the regulation, it may identify the property and property owner(s) likely to be affected, it may solicit input from interested parties as to the potential impact of the regulation, and, accordingly, may design the regulatory scheme in a fashion which does a minimum of damage to the owner's reasonable investment-backed expectations and/or has little economic impact on the property owner. Such careful analysis of the impact of proposed land use restrictions will be not only necessary to prevent inadvertent regulatory taking requiring compensation, but is prudent legislative practice as well. Moreover, even where reasonable, limited restraints

are necessarily imposed on the right to use and enjoy affected property, the Court's decisions carry a strong suggestion that as long as "some development will be permitted," it is unlikely that a taking will be found. *MacDonald, Sommer & Frates*, 106 S. Ct. at 2560; *Penn Central*, 438 U.S. at 138. And where doubt nevertheless persists, as it inevitably will in regulatory "close calls," governments may seek judicial confirmation of the appropriateness of the proposed activity by declaratory judgment or other available proceedings.

Second, as discussed, *supra*, pp. 11-12, the real impact of the *Agins* rule is to preclude a property owner from obtaining compensation for the temporary regulatory taking of his property during the effective period of the regulation. Since government would be required to compensate the owner for a regulation declared invalid if it chose to maintain the regulation in any event,⁷ invalidation of the *Agins* principle would expose governments to additional liability for compensation only for the interim period prior to invalidation.

The appropriate measure of compensation for such temporary regulatory takings has not, however, been judicially addressed, since *Agins* presently denies their award. The compensation necessary to make owners justly whole for the temporary taking of their property will likely depend on a variety of factors, including the nature of the property, the nature and impact of the regulation, and the owner's current or intended future use of the property. Thus, it is entirely premature to conclude that such

⁷ The ALI Model Land Development Code proposes a scheme which allows an alleged taking regulation to be adjudicated and, if held to be a taking, permits the government to elect to pay compensation or to withdraw the regulation. Model Land Dev. Code §9-112(3) (1975). The Code does not, however, address the necessity to pay compensation for the interim period.

awards will be necessarily large or injurious to public treasuries. NAR believes that state and lower federal courts will be able to fashion a measure of compensation providing "justice and fairness" for any economic injuries suffered by property owners as a consequence of temporary regulatory takings, *Penn Central*, 438 U.S. at 124, but which will not bankrupt state and local regulatory bodies or inhibit them from prudently but appropriately exercising their responsibilities.

CONCLUSION

The Just Compensation Clause guarantees that owners of private property be permitted to enjoy all the benefits of ownership free from the fear that those rights will be confiscated without just compensation. *Agins* destroys that guarantee, and must therefore be declared invalid.

The Court of Appeal below affirmed the dismissal of Appellant's first cause of action based on that Court's assumed obligation to follow the rule of California law established in *Agins*. Because this Court should now expressly hold that rule unconstitutional, the decision of the Court of Appeal should be reversed and this case returned to the trial court for hearing on that cause of action.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

12
No. 85-1199

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
October Term, 1985

**FIRST ENGLISH EVANGELICAL LUTHERAN
CHURCH OF GLENDALE, A CALIFORNIA
CORPORATION,**

Appellant,

vs.

COUNTY OF LOS ANGELES, CALIFORNIA,
Appellee.

ON APPEAL FROM
THE COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SEVEN

**BRIEF OF AMICUS CURIAE OF THE
CALIFORNIA ASSOCIATION OF REALTORS®
IN SUPPORT OF APPELLANT**

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No. 85-1199

IN THE
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October Term, 1985

FIRST ENGLISH EVANGELICAL LUTHERAN
CHURCH OF GLENDALE, A CALIFORNIA
CORPORATION,

Appellant,

vs.

COUNTY OF LOS ANGELES, CALIFORNIA,
Appellee.

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 36,
the California Association of Realtors®
respectfully submits this brief amicus
curiae in support of Appellant, First
English Evangelical Lutheran Church of

Glendale.

Amicus curiae California Association of Realtors® (C.A.R.) is a voluntary trade association whose members consist of Boards of Realtors® in California and those persons licensed by the state of California as real estate brokers and salespersons who are members of local boards. C.A.R. is the largest state trade association in the United States and has over 180 affiliated Boards of Realtors® and over 100,000 members.

The mission of C.A.R. is to serve in developing and promoting programs and services that will enhance the members' freedom and ability to conduct their individual businesses successfully with

integrity and competency. Moreover, C.A.R. serves to promote, through collective action, the preservation of real property rights.

The California rule that monetary compensation is not an appropriate remedy for a regulatory taking undermines the preservation of real property rights and has far-reaching significance to the real estate industry engaged in the development of real property. The California rule allows municipalities to impose land use regulations that deprive a private property landowner of all use of his property without any viable remedy.

Counsel for C.A.R. are familiar with the questions involved and the scope of their presentation and believe that further argument on the issues discussed by this amicus brief will be helpful to this Court.

SUMMARY OF THE ARGUMENT

This court is not presented with the broad question of establishing constitutional standards for determining whether a land use regulation constitutes a de facto taking of private property. Rather it is presented with the narrower question of whether compensation should be awarded when such a taking is found to have occurred.

The California rule as established in Agins v. Tiburon, 24 Cal. 3d 266 (1979), affirmed on other grounds 447 U.S. 255 (1980) holds that invalidation of the offending ordinance by declaratory relief or mandamus action is the sole remedy for a regulatory taking. This

rule is premised on the policy position that awarding monetary damages to an injured property owner will have a chilling effect on the exercise of police regulatory powers.

In 1981 this court rendered its opinion in San Diego Gas & Electric v. San Diego, 450 U.S. 621 (1981) (hereinafter referred to as San Diego), deciding the case on procedural matters. Justice Brennan expressed the view of four justices (and perhaps a majority of the Court) that when a governmental entity regulates private property so harshly as to constitute a "taking" just compensation is constitutionally mandated. This court is asked to reaffirm the essence of Justice Brennan's dissent.

This court has held that the powers of eminent domain and the police power are coterminous. The logical outcome of this holding is that the remedies should also be coterminous. Compensation is not only mandated by the Constitution it is also the most viable remedy in light of the political and social ramifications of the land use regulatory process. Moreover, compensation enhances the effectiveness of the decision making bodies in the land use setting.

ARGUMENT I

THE POWER OF EMINENT DOMAIN AND THE POLICE POWER ARE COTERMINOUS, MANDATING THE SAME REMEDY

The California rule as enunciated by the state's Supreme Court in Agins v. Tiburon, 24 Cal. 3d 266 (1979) (hereinafter referred to as Agins I), affirmed on other grounds, 447 U.S. 255 (1980) (hereinafter referred to as Agins II), separates the eminent domain power and the police power as distinct by differentiating the remedy for each. See also: Furey v. City of Sacramento, 24 Cal. 3d 862 (1979); Baker v. Burbank-Glendale-Pasadena Airport Authority, 29 Cal. 3d 862 (1985); Aptos Seascape Corp. v. County of Santa Cruz, 138 Cal. App. 3d 484 (1982); Gilliland v. County of Los

Angeles, 126 Cal. App. 3d 610 (1981).

In rendering its opinion that the eminent domain power and police power were so distinct as to warrant different remedies the California Supreme Court states:

"A landowner alleging that a zoning ordinance has deprived him of substantially all use of his land may attempt through declaratory relief or mandamus to invalidate the ordinance as excessive regulation, but he may not elect to sue in inverse condemnation and thereby transmute an excessive use of police power into a lawful taking for which compensation in eminent domain must be paid." 24 Cal. 3d at 273.

Further analysis of the law supports the position that the powers are coterminous so that when private property rights are taken by a government, regard-

less of the means utilized the Constitution and this court require that the individual property owner be compensated. Basic concepts of fairness dictate that compensation be paid when the government exercises its police power; if it is not that power is subject to abuse.

The concept of property has been recognized as a bundle of rights, the right to use property in a lawful, reasonable, peaceful and profitable manner being the most fundamental. Without the right to use, the concept of ownership is meaningless. Berger & Kanner, Thoughts on the White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property, 19 Loy.L.A.L.Rev. 685 (1986).

The Ninth Circuit Court of Appeals recently restated this concept in holding that the City of Santa Barbara's overly harsh mobilehome rent control ordinance constitutes a taking, justifying monetary damages.

"The right to occupy property in perpetuity is surely the type of interest that is protected by the taking clause." Hall v. City of Santa Barbara, No. 85-5838, slip op. at 9 (9th Cir. Aug. 22, 1986).

It has been argued that the distinction between eminent domain and police power lies in the fact that in eminent domain the government takes private property for its own use; whereas in police power it merely denies to a private person the right to use his property as he

sees fit. The former is an enjoyment of a proprietary benefit, the latter is the exercise of a regulatory power. See: 1 Nichols, Eminent Domain §1.42 et. seq.

A better view is that a taking is that which takes, whether by condemnation, regulation or any other exercise of governmental power.

Since 1922 this court has held the view that the police power and eminent domain power are essentially means to a common end. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (eminent domain and police power placed on a governmental power continuum); Berman v. Parker, 348 U.S. 26 (1954) (terms 'eminent domain' and 'police power' used interchangeably); Hawaiian Housing Auth-

ority v. Midkiff, ___ U.S. ___ 104 S. Ct. 2321 (1984) (public use requirement is coterminous with the scope of a sovereign's police power).

The purpose for which a governmental entity legitimately acquires property is a "public use" regardless of the means utilized. The effect of the acquisition on the private property owner is the same, a deprivation of the right to use the property, whether the means used to take the property is by eminent domain or police power. If the purpose and effect are the same, no rationale exists for distinguishing between the means in determining the remedy to which the property owner is entitled.

Once a court establishes a taking, whether by police power or power of eminent domain, the Constitution through the fifth and fourteenth amendments demands that the public entity pay just compensation. How the property is taken is not specified or limited by the Constitution.

The fifth amendment protects private property from noncompensable takings and speaks in terms of property "taken for public use" but does not specify by what means. Certainly the phrase "eminent domain" could have been used by the amendment's framers were it their intention to limit the fifth amendment only to such takings. Bauman, G., The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts The

Inevitable in Land Use Controls, 15 Rutgers Law Journal 15, 50 (1983), citing Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177 (1871).

This court has consistently held that a governmental entity's exercise of its regulatory police power can effect a taking within the meaning of a just compensation clause of the fifth amendment. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Penn Central Transportation Co. v. New York, 438 U.S. 104 (1978); Agins II; Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980); Kaiser Aetna v. U.S., 444 U.S. 164 (1979); U.S. v. Central Eureka Mining Co., 357 U.S. 155 (1958); San Diego Gas & Electric v. San Diego, 450 U.S. 621 (1981) (Brennan, J., dissenting); Ruckelshaus v. Monsanto,

467 U.S. 986 (1985).

A regulation will be deemed a taking if it either does not substantially advance state interests or if it denies a private property owner economically viable use of his land. See Agins II, 447 U.S. at 260.

The appellant in this case has lost total use of its property because of the governmental regulation. Presuming that facts would be decided in the appellant's favor, the foregoing analysis would support a holding that appellant's property was 'taken' under the fifth amendment.

Where a taking is effected, compensation must be paid. An unbroken line of

authority reiterates the clear statement contained in the cases following Pennsylvania Coal. See United States v. Central Eureka Mining Co., 357 U.S. 155 (1958), Bivens v. Unknown Agents, 403 U.S. 388 (1971), Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979), Kaiser Aetna v. United States, 444 U.S. 164 (1979); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Ruckelshaus v. Monsanto, 467 U.S. 986 (1984).

The court recognizes that the government cannot achieve through land use regulation what it should achieve by exercising eminent domain.

"From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it." San Diego Gas & Electric v. San Diego, 450 U.S. 621 at 652-53 (1981) (Brennan, J., dissenting).

The California rule that perpetuates the arcane distinction between eminent domain and police power creates a situation ripe for abuse. If a governmental entity can accomplish its goal with no threat of financial expenditure using police power rather than eminent domain, it will. There is no incentive for the governmental entity to respect the constitutional rights of the private property owner.

II

INVALIDATION IS INSUFFICIENT AS A REMEDY FOR ABUSES OF THE LAND USE REGULATORY PROCESS.

The rule in California is that inverse condemnation is not a proper action for a regulatory taking. Agins I, 24 Cal. 3d at 276.

This position fails to realistically deal with the fact that invalidation is not a viable remedy. Invalidation does not address the issue of compensation for the temporary taking. Invalidation is nullified by the use of the initiative process which is a growing trend in California for land use regulation. Invalidation is no remedy when an ordinance has been enacted for a legitimate purpose but

still denies the private property owner all use of his property.

A. TEMPORARY TAKINGS

An equitable system of compensation must provide a private property owner monetary damages for the time he was unable to use the property even if the courts invalidate the offending regulation. This is the essence of Justice Brennan's dissent in San Diego Gas & Electric v. San Diego, 450 U.S. 621 (1981).

"(O)nce a court finds that a police power regulation has effected a 'taking' the government entity must pay just compensation for the period commencing on the date the regulation first effected the 'taking' and ending on the date the government entity chooses to rescind or otherwise amend the

regulation." Id at 658.

The appellant has been prohibited by both the temporary and permanent ordinance from using its land since 1978. There is nothing in the current California rule that allows appellant to receive just compensation for the time the property has been lying fallow.

In order for the appellant to receive a remedy meeting the constitutional mandate the California rule must be overruled in favor of the constitutional requirement of just compensation.

B. INITIATIVE PROCESS

It is well settled law in California

that the adoption of the zoning ordinance can be accomplished by initiative or referendum. See: San Diego Building Contractors Association v. City Council, 13 Cal. 3d 205 (1974); Associated Home Builders v. City of Livermore, 18 Cal. 3d 582 (1986); Arnel Development Co. v. City of Costa Mesa, 28 Cal. 3d 511 (1980); City of Del Mar v. City of San Diego, 133 Cal. App. 3d 199 (1982); Building Industry Association v. City of Camarillo, ___ Cal. 3d ___, 226 Cal. Rptr. 81 (1986).

As a result the people of California have increasingly turned to the use of initiatives and/or referenda to regulate land use. These initiatives and referenda are being used primarily to limit growth and preserve environmental quality, and often take the form of a building or growth control moratorium.

See: The Growth Revolt: Aftershock of Proposition 13, State of California Office of Planning and Research, 1980.

Often the subject matter of the initiative or referendum is placed on the ballot because the people are displeased with the land use decisions of the municipality. Yet the same municipality has the obligation to defend the ordinance once it has been approved by the voters.

The chances that an ordinance will be found to be invalid in an ensuing lawsuit is highly unlikely in California, in light of the judicial deference given to the initiative and referendum power of the electorate. See: Comment, Judicial

Review of Initiative Constitutional Amendments, 14 U.C.Davis L.Rev. 461, 485 (1980); Eastman, H., Squelching Vox Populi: Judicial Review of the Initiative in California, 25 U. Santa Clara L.Rev. 529 (1985).

Pending the outcome of litigation all decisions regarding the use of the land will be held in abeyance, exactly the result the proponents of an overly harsh regulatory initiative desire. Even if the ordinance is found to be invalid the private property owner has been denied all use of his property during the years of costly legal battle. Without just compensation the injured property owner has no remedy for the unbridled excesses of special interest groups utilizing the initiative or referendum

process.

The California Supreme Court considered the initiative process in Agins I in arriving at its decision not to award just compensation. That court asked the rhetorical question "Are the voters, through the initiative power, also to have this unwelcome power to inadvertently commit funds from the public treasury?" 24 Cal. 3d at 277 (footnote omitted). That court's answer was in the affirmative but it disfavored that result from a policy position. Essentially that court held they should not have that power. Unwelcome or not it is precisely what is required and needed for the electorate to fully evaluate the ramifications of its actions.

C. LEGITIMATE GOVERNMENTAL GOALS

This court has repeatedly and consistently held that just compensation is the remedy for the taking of private property even for a public use. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (regulating cable access); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (public access to marina); United States v. Security Industrial Bank, 459 U.S. 70 (1982) (exercise of bankruptcy power separate from taking issue); Ruckleshaus v. Monsanto Co., 104 S.Ct. 2862 (1984) (registration of pesticides); Dames and Moore v. Regan, 453 U.S. 654 (1981) (Iranian hostage crisis); Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) (rail service to northeast United States).

In each of these cases the court was faced with the claim that the governmental entity in pursuit of legitimate goals had taken private property in violation of the Constitution. In each case this court stated that the issue of compensation must be determined even though there were legitimate exercises of legislative power.

A finding that invalidation is not only the primary but the sole remedy for a regulatory taking rests upon the presumption that a regulation that results in a taking must be invalid. A regulation enacted to advance legitimate governmental goals meets the public use prong of the taking test. The only invalidity is the effect of the

regulation, the taking of private property without just compensation.

In both California and Federal courts a rational basis test is used to evaluate the validity of a land use restriction. The land use restriction withstands constitutional attack if it is fairly debateable that the restriction in fact bears a reasonable relation to the general welfare. Associated Home Builders v. City of Livermore, 18 Cal. 3d 604 (1976); Euclid v. Ambler Co., 272 U.S. 365 (1926).

The Euclid court stated that before a zoning ordinance can be held unconstitutional, "it must be said that [its] provisions are clearly arbitrary and

unreasonable, having no substantial relation to the public health, safety, morals or general welfare." 272 U.S. at 388.

It is clear from the foregoing that an invalidation of the statute provides no remedy when the statute or ordinance advances legitimate governmental goals but denies the property owner all use of his property. The likelihood of a successful action in declaratory relief or mandamus in such a situation is hard to imagine. Invalidation after the fact is no remedy.

III

AVAILABILITY OF MONETARY DAMAGES
WILL SERVE TO INCREASE THE
EFFECTIVENESS OF SOCIETAL DECISION-
MAKING

The California Supreme Court in Agins I set forth several policy considerations which it resolved against just compensation as an appropriate remedy for a regulatory taking. That court found that monetary compensation would have a chilling effect on the decision-making powers of the municipality. Threat of financial ruination was a major element of that court's reasoning.

"Recognizing the constitutionally protected property interests here involved, we also accept the reasonable latitude which must be afforded public officials in the planning for and implementation of legitimate land use goals. These twin purposes will be served by

preserving for the landowner, in appropriate cases, declaratory relief or mandamus remedies. However, the use of inverse condemnation with its imposition of money damages upon the public entity would, in our view, unwisely inhibit the proper and necessary exercise of a valid police power." Agins I, 24 Cal. 3d at 278.

In fact the reverse is true. If a municipality is forced to weigh the true costs and benefits of a land use decision the decision-making process is more effective for all concerned. It cannot be said that meeting the constitutional requirements for just compensation can be ignored by elected decision makers because it is easier.

Justice Brennan in his dissent in San Diego, specifically stated that "the applicability of express constitutional

guarantees is not a matter to be determined on the basis of policy judgments made by the legislative, executive or judicial branches. Nor can the vindication of those rights depend on the expense in doing so." 450 U.S. 660-61.

This court has restated this view in Owen v. City of Independence, 445 U.S. at 652 (1980); holding that municipalities have no immunity from liability for violation of constitutional rights.

Not only will a holding that compensation is the appropriate remedy not have a chilling effect on the municipality it will have a positive effect on the decision-making process.

The cost of acquiring a societal benefit must be properly evaluated and it must include the financial costs.

"Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury. As one commentator aptly put it: 'Whatever other concerns should shape a particular official's actions, certainly one of them should be the constitutional rights of individuals who will be affected by his actions.'" 445 U.S. at 656. Quoting: Note, Developments in the Law: Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1224 (1977),

Whenever the government regulates land use it is exercising its "public" property rights to the detriment of the "private" property owner by redistributing those property rights. Compensation

would also redistribute the costs so that the individual does not have to bear the full burden of the societal decision-making. Blume & Rubinfeld, Compensation for Takings: An Economic Analysis, 72 Calif. L. Rev. 569 (July 1984).

The fundamental purpose of the Just Compensation clause is to shift the burdens of societal decision making.

"When one person is asked to assume more than a fair share of the public burden, the payment of just compensation operates to redistribute that economic cost from the individual to the public at large." San Diego, 450 U.S. at 656 (Justice Brennan dissenting).

The right to regulate the use of land carries with it the concomitant responsibility of ensuring that compensa-

tion is paid when it is mandated by the Constitution. This is the public policy that results in the most effective decision making.

"What fairness (or the utilitarian test) demands is assurance that society will not act deliberately so as to inflict painful burdens on some of its members unless such action is 'unavoidable' in the interest of long-run, general well-being. Society violates that assurance if it pursues a doubtfully efficient course and, at the same time, refuses compensation for resulting painful losses." Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L.Rev. 1165, 1235 (1967).

Allowing injured private property owners the right to pursue an inverse condemnation action when property has been "taken" by an overly harsh

regulation will allow the governmental entity and its constituents to evaluate the true cost of the decision making process.

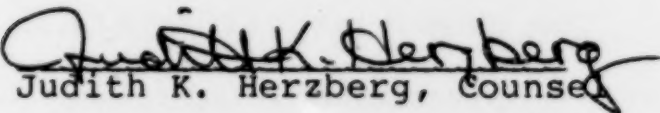
CONCLUSION

This court is presented with the issue of whether monetary compensation is an appropriate remedy for a regulatory taking. The people of California await a decision. Governmental agencies should not be encouraged to take private property without just compensation under the guise of innovative planning. California private property owners are entitled to their constitutional guarantees. It is urged that this court in light of the body of law supporting its position hold that just compensation is available when a regulatory taking occurs.

DATED: SEPTEMBER, 1986.

Respectfully Submitted,

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By 
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AMICUS CURIAE

BRIEF

No. 85-1199

Supreme Court, U.S.

FILED

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CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF GLENDALE,
a California corporation,

Appellant,

vs.

COUNTY OF LOS ANGELES, CALIFORNIA,

Appellee.

On Appeal from the Court of Appeal of California
Second Appellate District, Division Seven

**BRIEF OF THE CONSERVATION FOUNDATION, THE
ENVIRONMENTAL DEFENSE FUND, THE NATIONAL
AUDUBON SOCIETY, THE NATIONAL CONFERENCE OF
STATE HISTORIC PRESERVATION OFFICERS, THE
NATIONAL PARKS AND CONSERVATION ASSOCIATION,
NATIONAL RECREATION AND PARKS ASSOCIATION,
THE NATIONAL TRUST FOR HISTORIC PRESERVATION,
THE NATURAL RESOURCES DEFENSE COUNCIL, INC.,
PRESERVATION ACTION, AND THE SIERRA CLUB AS
AMICI CURIAE IN SUPPORT OF APPELLEE.**

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QUESTIONS PRESENTED

1. Whether a complaint states a cause of action for a regulatory taking arising out of a flood protection ordinance required by federal regulations as a condition to landowner participation in the federal flood insurance program, in the absence of allegations that a property owner sought development permission, or a variance.
2. Whether a complaint states a cause of action for a regulatory taking where a flood protection ordinance imposes reasonable requirements that structures be located and constructed to minimize dangers to life and property, while permitting the land uses to which the property was previously devoted, and where the property owner operated in a tightly regulated environment, fully aware of a high risk of periodic and devastating flooding.
3. Whether a flood protection ordinance adjusting the benefits and burdens of economic life to promote the common good and fairly balancing public and private interests can be the basis for a regulatory taking claim.
4. Whether regulatory takings trigger monetary relief for temporary harm arising before the highest appellate court invalidates a legislative enactment.

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IN THE
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OCTOBER TERM, 1986

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Appellant,

vs.

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Appellee.

On Appeal from the Court of Appeal of California
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BRIEF OF THE CONSERVATION FOUNDATION,
THE ENVIRONMENTAL DEFENSE FUND,
THE NATIONAL AUDUBON SOCIETY, THE NATIONAL
CONFERENCE OF STATE HISTORIC PRESERVATION
OFFICERS,
THE NATIONAL PARKS AND CONSERVATION ASSOCIATION,
THE NATIONAL RECREATION AND PARKS ASSOCIATION,
THE NATIONAL TRUST FOR HISTORIC PRESERVATION,
THE NATURAL RESOURCES DEFENSE COUNCIL, INC.,
PRESERVATION ACTION, AND THE SIERRA CLUB
AS AMICI CURIAE IN SUPPORT OF APPELLEE.

INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 42(2), the above-listed
organizations file this brief as Amici Curiae in support of

Appellees. Letters of consent from counsel for the parties have been filed with the Clerk.

Amici are organizations concerned with the protection and conservation of the natural and man-made environments and with environmentally-sensitive land use regulation and planning. All of the Amici seek to encourage environmentally and economically sound land use policies.

Appellant seeks a ruling that would threaten the effectiveness of the federal flood protection program. Through a combination of local regulations and flood insurance, this program has provided a workable alternative to environmentally damaging dams and channels. If flood protection regulations require compensation a return to exclusive reliance on these structural solutions will be inevitable.

Amici are also seriously concerned about the implications for other government environmental and historic preservation programs unless this Court sustains the decision below. Such programs are increasingly characterized by a mixture of regulations and economic incentives similar to that in the flood protection program. To strike down the regulatory component would upset the balance of all such programs. Examples of coordinated inter-governmental efforts involving both regulation and compensation include the historic preservation program (National Historic Preservation Act of 1966, 16 U.S.C. §§ 470 *et seq.* (1982); *see* 36 C.F.R. pt. 67 (1985); 26 U.S.C. § 48(g) (1982)); and the "Superfund" program (Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.*), which permits recovery of the governmental cost of controlling toxic wastes from inactive sites from existing facilities and establishes liabilities of site owners, customers and manufacturers. A more detailed description of each Amicus appears in Appendix A to this brief.

STATEMENT OF FACTS

Amici adopt by reference the statement of facts contained in Appellee's Brief. Several important facts warrant further discussion here.

The complaint--sounding in tort and inverse condemnation--was filed soon after the county's adoption of Ordinance No. 11,855, an emergency building moratorium covering the area of the 1978 flood in which ten people died. As the tort count progressed unsuccessfully to trial, the county was engaging in study and public hearings. In 1980 the County Regional Planning Commission passed a resolution recommending designation of the Mill Creek area, which includes portions of Appellant's property, as a Supplemental Flood Protection District, with two underlying zones ("Resort and Recreation" and "Heavy Agriculture"). That resolution recited the Commission's intent to recommend regulations that would ensure compliance with the federal flood protection program, while still permitting buildable areas on each affected parcel.

The County Board of Supervisors followed that recommendation in August, 1981 by identifying Mill Creek as Supplemental Flood Protection District Number 3. The county regulations governing flood protection districts operate together with the zoning ordinance, the building code and the county's general plan to set forth available land uses and building permit procedures. The underlying zoning district regulations and the supplemental flood protection district regulations are contained in Title 22 of the Los Angeles County Code.

SUMMARY OF ARGUMENT

Appellant's Complaint fails to state a cause of action for a regulatory taking under this Court's precedents.

I. The county flood control ordinance empowers a local official to permit construction in a flood protection zone

if it meets specified criteria designed to reduce potential devastation to life and property. This regulatory system is required by federal statute as a condition to landowner eligibility for federal flood insurance. Congressional intent, embodied in the intergovernmental system, is to use the insurance mechanism to shift the economic burden of flood damage by placing the financial responsibility for building in a flood plain on those who elect to do so. Appellant has not claimed that the range of land uses permitted by the plan and zoning ordinances is unconstitutionally restrictive. Appellant has not alleged that it sought and was denied a permit to rebuild or a variance from any of the requirements. Thus the complaint does not state a claim because Appellant does not know how the county will apply the ordinance to the property.

II. Appellant has failed to plead a denial of a property interest constituting a taking. The ordinance does not deny Appellant all reasonable use of its property but only requires that structures be safely located and constructed. Appellant's reasonable investment-backed expectations have not been frustrated because it must have known of the risk of flooding and the local regulatory environment.

III. The flood protection ordinance addresses extremely serious threats by adjusting the potential benefits and burdens of economic life to promote the common good of minimizing economic and social harm. The ordinance is a fair balancing of the county's public interest in protecting lives and property both within and beyond the flood hazard area, and Appellant's private interest in constructing buildings for retreat and recreational activities of church members and handicapped children.

IV. Even if, for purposes of argument, a regulatory taking had occurred in this case, no damages should be awarded for "temporary harm" arising prior to the highest appellate court's decision that an enactment is invalid. Legislative bodies need wide latitude in selecting tech-

niques to resolve public issues. Because it is generally difficult for such bodies to predict whether an enactment will be deemed a taking, awarding damages for "temporary harm" would unduly chill governmental decision makers.

ARGUMENT

I. Appellant's Complaint Does Not State A Claim Because It Facially Attacks Only One Regulatory Component Of A Program That Provides A Mixture Of Regulations And Economic Incentives.

A. Federal Law Required Adoption Of These Flood Protection Regulations To Make Property Owners In The County Eligible For Federal Flood Insurance.

1. Congress Has Enacted A Federal Flood Control Policy Based On The Principle That Those Who Occupy Flood Hazard Areas Should Be Responsible For The Results Of Their Actions.

Appellant has failed to state a claim under the taking clause because it has attacked on their face the local regulations that are only one component of a comprehensive federal program designed to compensate victims of flooding in the most economically efficient manner. As this Court has recently recognized, governmental programs to influence land development increasingly rely on a complex mixture of carrots and sticks. *MacDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561, 2567 (1986). The federal flood control program, of which the Los Angeles County ordinance is a part, would be rendered inoperative if this Court establishes a rule of absolute liability on the part of local governments in place of the insurance-based risk-sharing system devised by Congress.

The federal flood insurance program, which was in effect during all times relevant to this case, has operated on the principle that those who occupy the flood plain should be responsible for the results of their actions. Congress authorized federally-backed flood insurance with the intent

of converting federal disaster relief from a welfare-type program—one which gave people incentives to rebuild in dangerous areas in anticipation of again obtaining federal relief—into a self-financing system by which those who obtained benefits from the use of flood prone lands would pay insurance premiums to cover the cost of providing relief from future disasters. 42 U.S.C. §§ 4001, 4002 (1982).

To become eligible for flood insurance, property must be located in a governmental jurisdiction that has adopted regulations meeting federal criteria for controlling the design and location of structures that may be built in areas recognized as flood-prone. 42 U.S.C.A. § 4022 (Supp. 1986). These federal criteria are not designed to *prohibit* construction in such areas or to intrude into local determinations about types of land use; they are intended to ensure that whatever construction takes place is designed in a manner that minimizes the potential of flood damage to structures and neighboring properties. 44 C.F.R. § 60.3 (1985).

The Los Angeles County ordinances regulating development of Appellant's land are patterned on the federal regulations. They were specifically drafted to ensure that each tract of land, including Appellant's, retained sites on which buildings could be constructed. Regional Planning Commission, County of Los Angeles, Resolution, Flood Protection Case No. 3-(5). The county's regulations established extensive procedures through which building permits could be obtained for structures which were elevated above safe flood levels and designed to minimize impedance of flood flow. Los Angeles County Code § 22.44.220(A); Los Angeles County Code Title 26, § 308(a).

Twenty years ago, in response to the cost (to lives, property and the economy) of catastrophic floods, the Task Force on Federal Flood Control Policy issued a report that became the basis of a national program of flood control

and management of flood losses. TASK FORCE ON FEDERAL FLOOD CONTROL POLICY, A UNIFIED NATIONAL PROGRAM FOR MANAGING FLOOD LOSSES, H.R. DOC. NO. 465, 89th Cong., 2d Sess. 14 (1966). The Report recognized that public policies that "encourage submarginal development" in flood hazard areas impose additional economic burdens on society (including the costs of disaster relief and such protective measures as dams). Because flood damage is ultimately the result of investment decisions, federal policy should require that those "who occupy the flood plain should be responsible for the results of their actions." *Id.* The Report decried the then-current policies which unfairly benefitted the landowners in flood hazard areas who bear only a portion of the cost and often rely on public assistance in rehabilitation.

The general public, by bearing all or a major part of the cost of flood protection works and lessening the individuals' damage costs, further subsidize their use of the flood plain. Principles of economic efficiency and social equity thereby are violated.

Id. at 15. The Report recognized that "[n]o protective works can be designed which will not permit some damages, perhaps of catastrophic proportions, to occur when a flood far exceeds" expected heights. *Id.* at 14.

This Report pioneered in its use of economic analysis to evaluate federal policy alternatives:

Principles of national economic efficiency require . . . that the benefits of flood plain occupancy exceed all associated costs, not merely those borne by the individual or enterprise which so locates. Total associated, or full social, costs include--

Immediate expenses of development,

Damages to be endured by the occupant or the expense of protective measures undertaken to reduce the frequency and extent of flood damage,

Damages forced on others as a result of encroachment, and public costs involved in disaster relief and rehabilitation.

Flood plain occupation in which benefits do not exceed the estimated total costs, or which yields lower returns than other uses such as recreation and wildlife conservation, is undesirable, because it causes an eventual net loss to society. Any public policy which encourages submarginal development adds to those losses.

Id. at 13-14.

Congressional response came in the form of the National Flood Insurance Act of 1968, Pub. L. No. 90-448, 82 Stat. 572, and the Flood Disaster Protection Act of 1973, Pub. L. No. 93-234, 87 Stat. 979. Both Acts reflected the understanding enunciated by the Task Force concerning the role of the federal government in flood control:

In its concern for the general welfare, the Federal Government has a proper interest in measures to hold flood damages to an economic minimum. It has a responsibility to discourage flood plain development which would impose a later burden on the Federal taxpayer, which would benefit some only at the expense of others, and which would victimize unsuspecting citizens.

TASK FORCE ON FEDERAL FLOOD CONTROL POLICY, *supra*, at 15.

Federal, state and local governments, as well as individual landowners, all have a role in this comprehensive program. The federal government has responsibility for

collecting and disseminating data, providing technical assistance, constructing flood control projects, and managing an indemnification program. State governments are responsible for authorizing flood protection regulations, establishing limits on flood plain encroachments, and assisting local planning efforts. Municipalities are responsible for guiding development and controlling the use of high hazard areas. Individual landowners have the responsibility for "careful weighing of the costs and advantages of developing and occupying alternative sites; [and a] willingness to assume financial responsibility for new locational decisions." *Id.* at 17.

2. Los Angeles County Was Required To Adopt Its Flood Protection Regulations In Order To Make County Property Owners Eligible For Federal Flood Insurance.

The National Flood Insurance Program (NFIP) makes federally subsidized insurance available to landowners of parcels located in flood hazard areas, but *only* if the appropriate local body has adopted "adequate flood plain ordinances with effective enforcement provisions consistent with Federal standards to reduce or avoid future flood losses." 42 U.S.C. § 4002(b)(3) (1982). NFIP regulations require that communities define the limits of flood-prone areas and prepare maps delineating these locations. Permits must be required for all proposed construction within these areas. 44 C.F.R. § 60.3(b). "[A]ll new construction and substantial improvements of non-residential structures" must either be flood-proofed or have their lowest structural member elevated to a certain height. *Id.* § 60.3(c)(3). The adequacy of flood-proofing techniques must be determined by a certified professional engineer or architect. *Id.* § 60.3(c)(4). Regulations discourage development "that would result in any increase in flood levels within the community." *Id.* § 60.3(d)(3).

The flood control regulations adopted by Los Angeles County (ch. 22.44 and Ordinance 12,413) complied with

these federal standards. The County Regional Planning Commission adopted a 1980 resolution that resulted in the 1981 Ordinance here under attack. The resolution set forth various findings, including:

2. That the subject property case represents one strategy in Los Angeles County's comprehensive program to insure compliance with the requirements of the Federal Flood Protection Program by designation of a flood protection area along the stream bed of Mill Creek;

3. That this will be accomplished by the prohibition of buildings and major structures within the area reserved for flood flows which includes both the existing wash or channel and additional area as may be necessary to provide reasonable protection from overflow of flood waters, bank erosion and debris deposition;

The 1981 ordinance, modeled after these recommendations, meets the criteria established by the federal regulations.

The County regulations allow construction, alteration and reconstruction in areas designated as "subject to substantial flood hazard" of "accessory buildings and structures that will not substantially impede the flow of water," as long as:

The placement of the building and other structures (including walls and fences) on the building site shall be such that water or mud flow will not be a hazard to the building or adjacent property. . . . [T]his prohibition shall not apply when provision is made to eliminate such hazard to the satisfaction of the County Engineer by providing adequate drainage facilities, by protective walls, by suitable fill, by raising the floor level of the building, by a combination of these methods, or by other means. The County Engineer, in the

application of this subsection, shall enforce, as a minimum, the current Federal flood plain management regulations defined in Title 24, Chapter X, Subchapter B - National Flood Insurance Program, Part 1910.

Los Angeles County Code, Title 26, § 308; *see id.* ch. 22.44. These regulations are essentially "performance based" -- suitable structures will be permitted, but unsafe ones will be barred.

B. Appellant Has Failed To Apply For Development Permission From The County Engineer, Who Has Authority To Permit "Accessory Buildings And Structures That Will Not Substantially Impede The Flow Of Water."

The Complaint fails to identify the administrative procedure for obtaining permission to rebuild following flood damage. Appellant mistakenly quotes from Ordinance No. 11,855, which was a temporary, emergency measure adopted in response to the devastating 1978 flood that killed ten people. The permanent ordinance, No. 12,413, is quite different and, in conjunction with ch. 22.44 of the Los Angeles County Code referred to above, establishes a flexible mechanism for determining what construction is safe and should be allowed following flood damage. It also responds to the Regional Planning Commission's 1980 finding that "all affected parcels will have buildable area."

These provisions of the permanent ordinance empower the County Engineer to approve "accessory buildings and structures that will not substantially impede the flow of water." The term "accessory" is defined in § 22.08.010 of the county zoning code as follows:

Accessory building or structure means a detached subordinate building or structure, the use of which is customarily incidental to that of the main building or to the main use of the land, and which

is located in the same or a less restrictive zone, and on the same lot or parcel of land with the main building *or use*. (Emphasis added).

The zoning ordinance permits accessory buildings to be constructed that are incidental to the "main use" of the property even though the property contains no main building. The Appellant's main use of its property has always been recreation, and indeed the underlying zoning and planning regulations applicable to this property (which Appellant has not challenged) permit a broad range of recreational pursuits and little else. Los Angeles County Code, ch. 22.40.

Appellant argues that an accessory structure by its very nature requires an existing principal structure to which it can be an accessory. But that is not what the ordinance says, and the ordinance is very similar to standard definitions used in zoning ordinances elsewhere. See R. ANDERSON, 3 AMERICAN LAW OF ZONING 31 (2d. ed. 1977). If the main use of the property is recreation, which is a use not requiring a structure, then a structure may be accessory to the main recreational use even if the accessory structure is the only structure on the property. *Board of Park Commissioners of Cleveland Metropolitan Park District v. City of Bay Village*, 78 Ohio Abs. 389, 141 N.E.2d 769 (Ohio App. 1957) (refreshment stand allowed as accessory use of land devoted to park purposes); *Berberich v. Concordia Gymnastic Society*, 402 S.W.2d 582 (Mo. App. 1966) (swimming pool structure allowed as accessory building in private park).

Appellant in this case has done nothing to ascertain the county's position on any specific building proposal. In *MacDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561, 2568-69 (1986), the unsuccessful landowner had at least taken the step of submitting one subdivision proposal;

nevertheless, this Court affirmed the dismissal of the taking complaint because the local government had not yet stated its definitive position on the application of the regulations to the land in question. See also *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 297 (1981); *United States v. Riverside Bayview Homes, Inc.*, 106 S. Ct. 455, 459 (1985).

The purpose of flood protection regulations is not to prevent construction of buildings but to regulate such construction so that it minimizes damage to others and reduces potential cost to the public. Until a permit is sought these issues cannot even be addressed, much less resolved.

Appellant has acknowledged that the design and location of structures on its property involve considerations of serious potential hazard. In its pleadings it has conceded that in "prolonged rainfall, significant hazards will exist" and that "people living in the canyon bottom or using the campgrounds will run the risk of being caught in a flooding situation." Second Amended Complaint, ¶ 7, Jt. App. 45 (citing a government report). The alleged property damage in 1978 was extensive: destruction of a bridge, meeting hall, kitchen, dormitory, pool, recreational facilities, trailers, and utilities. Second Amended Complaint, ¶ 13, Jt. App. 47-48. The 1969 flood damage had also been serious. "Ten people in the general vicinity lost their lives [in the 1978 flood] (see RT 10)." Appellant's Brief to the California Supreme Court at 10. In that Brief, Appellant also admits that the February 1978 "storm was the disaster everyone expected . . ." *Id.* at 10.

The hazardous nature of this particular location makes it all the more important that a development proposal be given a thorough engineering evaluation based on topography, location and surroundings before the validity of the regulations is determined by this Court.

II. Appellant Has Failed To Allege A Denial Of A Property Interest Amounting To A Taking Under This Court's Precedents.

A. This Court Requires An Ad Hoc Factual Inquiry To Determine The Fairness And Justice Of A Challenged Regulation.

The underlying principle of the just compensation clause is to ensure fairness and justice to both property owners and the public. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). This Court has, in several recent cases alleging regulatory takings, developed and refined the criteria for determining when a governmental action "goes too far" in violation of the just compensation clause. Those criteria guide courts in deciding when the burdens that fall on a property owner should be shifted to the government.

In the seminal *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), this Court stressed that economic injuries caused by regulation should be shifted to the government, "rather than remain disproportionately concentrated on a few persons," only if it is "fair and just" to do so. *Id.* at 124. The Court identified several previous cases in which "the challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm," but these governmental actions were nevertheless upheld against taking challenges. *Id.* at 125 (citing *Miller v. Schoene*, 276 U.S. 272 (1928); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962)). In each of those cases the ordinance upheld by this Court went far beyond the flood control regulations at issue here. Those ordinances explicitly barred certain uses; the flood control regulations, by contrast, do not touch upon use but only limit construction in high hazard areas and establish a procedure to authorize safe rebuilding.

This Court identified three factors in *Penn Central* to determine whether "fairness and justice" require that economic injuries be compensated by the government in the regulatory context: the economic impact of the regulation, the extent to which the regulation interferes with "distinct investment-backed expectations," and the character of the governmental action. *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 124. The relative significance of any one of those factors will vary from case to case, see, e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), but will always be analyzed with a view to furthering the policies of the just compensation clause:

The purpose of forbidding uncompensated takings of private property for public use is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Connolly v. Pension Benefit Guaranty Corp., 106 S. Ct. 1018, 1027 (1986) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

B. The Ordinance Permits Reasonable Use Of The Property Consistent With The Federal Flood Control Policy Of Promoting Economic Efficiency And Social Equity.

There is nothing in the record to support Appellant's conclusory allegation that "Ordinance No. 11,855 denies First Church all use of Lutherglenn." Second Amended Complaint, ¶ 18. Ordinance 11,855 was only a temporary, emergency measure adopted in response to the devastating flood in 1978 in which ten persons died. That ordinance is no longer operative. Instead, a permanent ordinance now contained at Section 22.44.220 of the county zoning code limits buildings and structures to those approved by the County Engineer according to specified criteria. Thus, as in *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 261 (1981), the ordinance does not on its face deny all use of Lutherglenn:

[T]he Act does not categorically prohibit [the activity]; it merely regulates the conditions under which such operations may be conducted. The Act does not purport to regulate alternative uses to which [the] lands may be put. Thus, in the posture in which these cases come before us, there is no reason to suppose that "mere enactment" of the . . . Act has deprived appellees of economically viable use of their property.

Id. at 296-97 (footnotes omitted).

The rebuilding permission requirement is not unfair or unjust, especially in light of the church's goals. Even assuming that any permitted structures would have to be designed and located to minimize flood damage, such requirements would enhance rather than undermine the church's purposes of providing a safe location for retreats and recreation. Admittedly such safety requirements might entail additional expense, but that would be the case with any safety improvement (such as the provision of ramp bars for the protection of the handicapped children).

Restrictions that curtail some potential for the economic exploitation of private property are not for that reason a taking. *Andrus v. Allard*, 441 U.S. 51 (1979). Here, the permissible retreat and recreational activities are much broader than the modest uses permitted in *Andrus*. They are also more commensurate with the pre-existing uses to which Luther Glen was devoted. See also *Goldblatt v. Hempstead*, 369 U.S. 590 (1962).

Even if Appellant had suffered an economic impact, that conclusion alone would not produce a regulatory taking. Just last term this Court upheld against a taking challenge a federal statute that imposed liability for certain withdrawals from multi-employer pension plans. As to the "economic impact" test, the Court wrote:

[T]here is no doubt that the Act completely deprives an employer of whatever amount of money it is obligated to pay to fulfill its statutory liability. The assessment of withdrawal liability is not made in a vacuum, however, but directly depends on the relationship between the employer and the plan to which it had made contributions. Moreover, there are a significant number of provisions in the Act that moderate and mitigate the economic impact of an individual employer's liability. There is nothing to show that the withdrawal liability actually imposed on an employer will always be out of proportion to its experience with the plan, and the mere fact that the employer must pay money to comply with the Act is but a necessary consequence of the MPPAA's regulatory scheme.

Connolly v. Pension Benefit Guaranty Corp., 106 S. Ct. at 1026-27 (footnote omitted). In the instant case the insurance and permit provisions similarly "moderate and mitigate the economic impact" of the regulations.

C. There Has Been No Taking Because Appellant Has Not Been Deprived Of Reasonable Investment-Backed Expectations.

1. Because Flooding In The California Canyons Was A Known Risk, Appellant Had No Reasonable Investment-Backed Expectation Of Being Permitted To Rebuild Without Safeguards.

Even if Appellant desires to rebuild (which the Complaint fails to allege and as to which no permission has been sought), that desire is no more than a "unilateral expectation or an abstract need" that falls short of a "reasonable investment-backed expectation." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980).

Prior to the 1978 flood, Appellant was on notice that flooding of California rivers and creeks was a serious haz-

ard to life and property. Indeed, Mill Creek flooded in 1969, 12 years after Appellant acquired the property. Appellant sustained damage to its facilities during that flood. (Exhibit A to Complaint at 20.)

2. Appellant Knew That It Was Operating In A Regulated Environment In Which Regulations Might Change.

Appellant's brief asserts that land use regulatory activities in California have been unusually aggressive and improperly sanctioned by the state courts. See, e.g., Appellant's Brief at 27-30. While amici do not accept that accusation, its very assertion proves that Appellant was fully aware that California local governments routinely refine their regulations to protect public values.

Changing regulations are a normal occurrence in a regulated environment. Not only did Appellant continue to operate Lutherglen with full knowledge of the likelihood of general regulatory changes, but it was on notice that flood control rebuilding restrictions were likely.

This Court's recent pronouncements make clear that, in a regulated environment, the likelihood of amendments to governmental regulations eliminates "reasonable investment-backed expectations" in the status quo. In *Connolly*, plaintiffs argued that they had such expectations to prevent the imposition of a new withdrawal liability requirement. This Court disagreed:

Pension plans, however, were the objects of legislative concern long before the passage of ERISA in 1974. . . . It was also plain enough that the purpose of imposing withdrawal liability was to ensure that employees would receive the benefits promised them. When it became evident that ERISA fell short of achieving this end, Congress adopted the 1980 amendments. . . . "Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subse-

quent amendments to achieve the legislative end." *F.H.A. v. Darlington, Inc.*, 358 U.S. 84, 91 (1958). See also *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976) and cases cited therein.

Connolly v. Pension Benefit Guaranty Corp., 106 S. Ct. 1018, 1027 (1986).

To the same effect is *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986 (1984), where this Court emphasized that the evolution of pesticide regulations there under attack was merely a burden that arises out of living in a civilized society:

This is particularly true in an area, such as pesticide sale and use, that has long been the source of public concern and the subject of government regulation. That Monsanto is willing to bear this burden in exchange for the ability to market pesticides in this country is evidenced by the fact that it has continued to expand its research and development and to submit data to EPA despite the enactment of the 1978 amendments to FIFRA.

Id. at 1007 (footnote omitted).

Of necessity, flood protection regulations will evolve as more and more information is obtained about flood hazards. Indeed, Congress has long authorized extensive studies of land management in flood prone areas. See, e.g., 42 U.S.C.A. § 4102 (Supp. 1986). In the face of this longstanding concern about flood hazards, uninsured investment in flood prone areas can only involve a reasonable expectation of risk, not of profit.

III. The Ordinance Adjusts The Benefits And Burdens Of Economic Life To Promote The Common Good.

A. Police Power Enactments Are Entitled To Great Weight.

The touchstone of the just compensation clause is to ensure "fairness and justice" to property owners and the public. For that reason, one of the three factors generally used in these "essentially ad hoc inquiries" is the character of the governmental action:

A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Penn Central Transportation Co. v. City of New York, 438 U.S. at 124. *Penn Central* accords this factor central importance in cases where "a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land," even where such regulation "destroyed or adversely affected recognized real property interests." *Id.* at 125.

California courts have approved other flood control ordinances as within the police power. *See, e.g., Turner v. County of Del Norte*, 24 Cal. App. 3d 311, 101 Cal. Rptr. 93 (1972); *Zisk v. Roseville*, 56 Cal. App. 3d 41, 127 Cal. Rptr. 896 (1976). Here, although no California court has specifically considered the Los Angeles flood control regulations, Appellant has conceded the validity of their purpose:

No challenge is raised to the first issue [is the governmental objective within the ambit of the police power?]. First Church concedes that the general goal of flood protection is laudable.

Appellant's Brief at 45.

Appellant's concession on this point is hardly surprising in light of the long line of state police power cases throughout the nation supporting such enactments. Indeed, one of the leading zoning law commentators notes that "No court has held such regulation ultra vires" and generally that state courts have "strongly endorsed the objective of flood loss reduction." RATHKOPF, *THE LAW OF ZONING AND PLANNING* 7-22 (1986 ed.). *See Turnpike Realty Co. v. Town of Dedham*, 362 Mass. 221, 284 N.E.2d 891 (1972), cert. denied, 409 U.S. 1108 (1973). Flood control regulations have been upheld in cases where they severely limited the land to low intensity uses such as open space, agriculture, horticulture, and recreation, *Turnpike Realty Co., supra*; parks, recreation and agriculture, *Turner v. County of Del Norte*, 24 Cal. App. 3d 311, 101 Cal. Rptr. 93 (1972); and camping, *Claridge v. New Hampshire Wetlands Board*, 125 N.H. 745, 485 A.2d 287 (1984). As the California court stated in *Turner*, such restrictions are legitimate exercises of the police power because "the zoning ordinance in question imposes no restrictions more stringent than the existing danger demands." 101 Cal. Rptr. at 96.

B. This Court's Precedents Require A Weighing Of Public And Private Interests.

The importance of the public interest in the balancing process was recognized even before *Penn Central*. Justice Holmes, writing in *Pennsylvania Coal*, identified the need to balance public with private values. 260 U.S. at 414. The cases discussed with approval by this Court in *Penn Central* also reflect this essential concern. Thus in *Miller v. Schoene*, 276 U.S. 272 (1928), the Court rejected a regulatory taking attack on an ordinance that destroyed plaintiff's cedar trees because the legislature had reasonably determined that the apple industry, whose trees were being harmed by disease carried by the cedar trees, was "of greater value to the public." *Id.* at 279. In *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), plaintiff's existing brickyard business was validly prohibited because the local gov-

ernment had deemed it harmful to the neighborhood. As to each of those two cases, the *Penn Central* opinion observed that, "[b]ecause the restriction served a substantial public purpose, the Court thus held no taking had occurred," 438 U.S. at 127, even though the governmental actions "prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm." *Id.* at 125. See also *Mugler v. Kansas*, 123 U.S. 623 (1887); *Welch v. Swasey*, 214 U.S. 91 (1909); *Sintell v. New Orleans*, 166 U.S. 698, 704 (1897).

The prevention of public harm has long been recognized as one of the most traditional and important purposes for governmental action. Construction on flood-prone property entails serious risk of harm to persons other than the property owner. Structures may block the flow of water and thus increase flood levels; floating debris can damage downstream property; poorly designed construction may cause soil erosion and the release of unsanitary water.

Flood protection regulations are aimed at protecting the public from these dangers to life and property. Among the essential public policy objectives are: (1) the prevention of individual choice that results in obstruction of the flood flow so as to cause damage to others; (2) the protection of individuals who do not know a flood danger exists from poor choices of land use leading to loss of health, safety, and property; and (3) the prevention of injury to taxpayers who would have to pay for public works and disaster relief in the event of flood damage. Dunham, *Flood Control Via the Police Power*, 107 U. PA. L. REV. 1098, 1108-09 (1959). Unfortunately, physical flood control devices such as dams, reservoirs, sewers, and flood walls, "are expensive and are never completely effective." Hines, Howe & Montgomery, *Suggestions for a Model Flood Plain Zoning Ordinance*, 5 LAND & WATER L. REV. 321, 324 (1974). At best, these devices can reduce flood damage; they can never eliminate it. They can also foster a false sense of security and thereby encourage development where none should take

place. U.S. WATER RESOURCES COUNCIL, REGULATION OF FLOOD HAZARD AREAS TO REDUCE FLOOD LOSSES, I-B, 9 (1971).

The flood protection regulations required by NFIP are designed to minimize or eliminate development that would result in an increase in the flood height, thus protecting property outside the flood plain as well as that within the area. By minimizing the potential loss of property, such regulations also serve the substantial public interest of avoiding excessive expenditures for disaster relief and public works.

The regulations are also designed to protect persons who use property within the flood hazard area but who are unable reasonably to assess and consent to the high risk of death or serious bodily harm. The facts reveal that handicapped children of all religious denominations regularly use the property for retreats and recreation. Appellant's Brief at 2. Whether those children are mentally or physically handicapped (or both), they are at special risk if they stay overnight in any rebuilt dormitory. They would be especially slow at evacuation in the event of a flood, assuming the flood conditions allowed any time for an exodus. Additionally, their age and condition precludes informed assumption of the risks.

IV. Even If This Court Eventually Decides That Damages Is An Available Remedy For A Regulatory Taking, Damages Should Not Be Awarded For Alleged Losses Incurred Before The Time When The Highest Appellate Court Invalidates The Regulation.

A. Under This Court's Precedents, The Just Compensation Clause Does Not Require Damages For "Temporary Harms."

Justice Powell's unanimous opinion in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), includes a ringing rejection of a subsidiary claim by the landowners--that the city's

filing and later abandonment of formal eminent domain proceedings constituted a compensable taking. Referring to a long line of previous cases, this Court unanimously held that such precondemnation activities were not compensable:

Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are "incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense."

Id. at 263 n.9 (citations omitted).

This Court in *Agins* relied on the 1939 case of *Danforth v. United States*, 308 U.S. 271 (1939), for its rejection of damages for an alleged temporary taking. In *Danforth*, the plaintiff landowner had sought temporary damages because of the inability to sell his land between the date of legislative authorization to condemn for flood control purposes and the date of final order of condemnation. This Court did not disagree that some temporary harm had in fact occurred, but nevertheless barred recovery for that period:

[T]he determination of the [actual condemnation award] is an offer subject to acceptance by the [government] and thus gives [it] an opportunity to determine whether the valuations leave the cost of completion within its resources.

Id. at 284.

Thus if the government chooses to acquire property it is afforded the opportunity to study the effect of the award on the funds available for the program and to decide after such study whether to complete the purchase at the price required by the award. If this option is available to the

government when it intentionally acquires private property should not the same option be available when it unintentionally acquires property?

This Court's majority opinion in *Williamson County* also supports rejection of compensation for temporary harms. This follows from the second reason why Hamilton Bank's claim was not ripe for adjudication:

[B]ecause the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied. . . . [T]he State's action here is not "complete" until the State fails to provide adequate compensation for the taking.

Williamson County Regional Planning Comm'n v. Hamilton Bank, 105 S. Ct. 3108, 3121-22 & n.13 (emphasis in original). The first moment when a government has "failed" to provide such compensation is necessarily after a court has determined that its actions constitute a taking, i.e., not during the period of temporary harm and before such a final order.

Barring compensation for temporary harms is also consistent with the overriding purpose of the just compensation clause itself: to ensure justice and fairness to property owners and the public. *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 124. The temporary harms are unfortunate but necessary by-products of programs that are part of living in a regulated, civilized society. See also *Kirby Forest Industries, Inc. v. United States*, 104 S. Ct. 2187 (1984) (no impairment of interest in "any constitutionally significant way.")

B. Permitting Damages For "Temporary Harms" Would Unduly Interfere With The Relationship Between The Judicial And Legislative Branches.

The effect of permitting damages for temporary harms would be to inform the government that its previous decision to regulate was in fact a decision to condemn for

the period beginning with the date of the enactment and ending upon the date of judicial invalidation. Stated differently, a court would be ordering a government to expend scarce public funds for a purpose not chosen by that body. That effect would undermine the long-standing, vital principle that courts will afford substantial deference to legislative determinations of what the public interest requires.

For example, in the early land use case of *Gorieb v. Fox*, 274 U.S. 603, 608 (1927), this Court held:

State legislatures and city councils, who deal with the situation from a practical stand-point, are better qualified than the courts to determine the necessity, character, and degree of regulation which these new and perplexing conditions require and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable.

See also *Zahn v. Board of Public Works*, 274 U.S. 325, 328 (1927) ("The settled rule of this court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question"); *Berman v. Parker*, 348 U.S. 26, 32 (1954) (governmental determination of the public interest "well-nigh conclusive"); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

It goes without saying that courts should avoid inhibiting "the vigorous exercise of official authority," *Butz v. Economou*, 438 U.S. 478, 506 (1978), because "the public interest requires decisions and action to enforce laws for the protection of the public." *Scheuer v. Rhodes*, 416 U.S. 232, 241 (1974). This principle has full force as to local governments as well:

A few years ago the National Association of County Planners conducted a survey of 300 of

its members, asking first whether they would adopt a particular form of land use regulation and then asking whether they would do so if a successful landowner suit would result in an award of damages as well as invalidation of the regulation. Eighty-three percent of the respondents who were initially in favor of the regulation stated that they would not be in favor of its promulgation with the threat of monetary damages lurking in the distance.

—Sallet, *Regulatory "Takings" and Just Compensation: The Supreme Court's Search for a Solution Continues*, 18 URB. LAW. 635, 636 (1986) (quoting National Association of County Planning Directors, "Zoning Survey Results," Sept. 1980).¹

The flood-related deaths, physical injuries, property damage, and federal insurance payments are vivid testimony to the compelling need for flood protection regulations, surely to be impeded if local governments are deterred from taking protective steps by the threat of damage actions for temporary harms. Ten lawsuits were filed against Los Angeles County by persons injured and killed by the 1978 flood. Four of the ten death cases sought \$20 million in damages. As of June, 1980, the ten suits were "ex-

¹ This phenomenon has not gone unnoticed by this Court. Then-Associate Justice Rehnquist, concurring and dissenting in *Butz v. Economou*, observed:

It simply defies logic and common experience to suggest that officials will not have this [specter of damage liability] in the back of their minds when considering what official course to pursue. It likewise strains credulity to suggest that this threat will only inhibit officials from taking action which they should not take in any event. It is the cases in which the grounds for action are doubtful, or in which the actor is timid, which will be affected"

438 U.S. at 526-27 (Rehnquist, J., concurring in part and dissenting in part).

pected to be the most dramatic losses in the coming year" to the county. Jt. App. 39. If a rebuilding permit were issued without appropriate conditions to protect against flood losses, the county might again risk being sued in tort for negligent issuance of the permit.

From a national perspective, the harm that could ensue from the deterrence of local flood protection regulations is of staggering dimensions. During the 1970's an estimated 176 lives were lost each year due to flooding, and property valued at \$3.8 billion was destroyed annually. THE CONSERVATION FOUNDATION, STATE OF THE ENVIRONMENT 1982, at 105 (1982). Unless local governments are encouraged to participate in the federal flood protection program these numbers will continue to increase.

C. Barring Damages for "Temporary Harms" Would Harmonize With This Court's Flexible Interpretation Of The Taking Clause.

The line between valid regulation and regulatory taking is difficult to draw in particular instances. This arises primarily from the conclusion that the just compensation clause requires fairness and justice, determined in concrete cases on an ad hoc basis, primarily through application of the three factors established and refined by this Court over the years in cases such as *Penn Central*.

The extreme difficulty of knowing at the time of enactment whether an ordinance does or does not require compensation puts local governments in a very difficult position. It would be plainly unfair to require such a government (whose officials are acting reasonably, in good faith, and with procedural fairness) to assume the financial risk of guessing wrong as to the constitutionality of the enactment.

This Court was faced with a similar dilemma in a different context in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). There, the issue was the scope of qualified immunity for

public officials sued under 42 U.S.C. § 1983. Establishing criteria for immunity required a balancing of interests. Although protection of citizens from abuse of power was an important goal:

At the same time, however, it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs include . . . the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties."

Id. at 814 (footnote and citation omitted). This Court weighed the competing interests and elected to "hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

Amici believe that governmental actions causing temporary harms should not be compensable unless, consistent with this principle, the governmental body at the time of enactment violated such "clearly established rights." In 1981, Justice Brennan asked "After all, a policeman must know the Constitution, then why not a planner?" *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 662 n.26 (1981) (Brennan, J., dissenting). But in 1982, *Harlow* limited the policeman's required knowledge of the constitution to clearly established rights. Local planners should not be expected to be more profound constitutional scholars than local policemen. In light of the difficulty of predicting how this Court will weigh the competing interests while engaging in its "*ad hoc* inquiry," it cannot be said here that the County violated "clearly established rights."

CONCLUSION

If this Court finds that the Complaint states a cause of action, it would drastically undermine a comprehensive federal, state and local system of achieving economic efficiency and social equity in allocating the burdens of flood control damage. Such a decision would also adversely impact the development of other inter-governmental programs involving a mixture of regulation and compensation. These types of programs are increasingly developed by Congress as the most sensitive methods for addressing complex problems.

This Court recently observed that "The local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand, they may give back with the other." *MacDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. at 2567. In this case, Appellant has simply refused to cooperate in a fair system, adopted by all levels of government, to further the common goals of protecting society from flood damage and equitably allocating flood losses through a combination of regulation and flood insurance.

Amici are organizations deeply interested in promoting economic efficiency and social equity in land use decision making by governments and landowners, especially where health, safety and environmental values are of crucial concern. Amici urge this Court to affirm the decision of the California Court of Appeal and hold that no taking has occurred.

Respectfully submitted,

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APPENDIX

APPENDIX A

1. The Conservation Foundation is a nonprofit research and communications organization based in Washington, D.C. The Foundation's primary purposes are to improve the quality of the environment and to promote wise use of the Earth's resources. Since its founding in 1948, the Conservation Foundation has worked extensively in the fields of land use planning, urban conservation, coastal resources protection, and public land management.

2. The Environmental Defense Fund (EDF) is a private, nonprofit, national membership organization with offices in Washington, D.C.; New York City; Denver; Richmond, Virginia; and Berkeley, California. It has a membership of more than 50,000 persons, including scientists, educators, lawyers and other citizens dedicated to finding scientifically sound solutions to the nation's environmental problems. EDF and its members have a keen interest in promoting environmentally sound land use management policy at all levels of government.

3. The National Audubon Society (NAS) is a nationwide nonprofit membership organization with over 500 chapters and 550,000 members. NAS' goals include working for policies that encourage environmentally and economically sound land and water resource planning at the national, state, and local levels and promoting environmentally sensitive development and rehabilitation in our cities. NAS has over 60,000 members in California and permanent offices in Sacramento and Ventura as well as a number of sanctuaries and nature centers in the state.

4. The National Conference of State Historic Preservation Officers (NCSHPO) is a nonprofit, professional and educational organization representing the gubernatorially appointed state historic preservation officers in the 50 states, six U.S. territories and the District of Columbia. The NCSHPO plays a central role in the administration of the

national historic preservation program, including the development of strong local government preservation programs.

5. The National Parks and Conservation Association is a national nonprofit membership organization with approximately 50,000 members and contributors nationwide. The Association's main goal is the preservation and expansion of the National Park system. It is particularly concerned with the units of the system, but the Association has found that approximately two-thirds of the National Park system's units are adversely affected by incompatible land uses and activities outside their borders. The Association has concluded that in the long run one of the most promising solutions to these problems is the application of local land use laws, especially zoning, to prevent adverse uses and activities.

6. The National Recreation and Parks Association (NRPA) is a national, nonprofit organization engaged in a wide range of research, education, policy and program initiatives in the area of parks and recreation. NRPA has a membership of more than 19,000 individuals, organizations and agencies performing an array of civic, professional and technical functions to meet diverse recreational demands. For the most part, NRPA's members are associated with public forest, park and recreation systems. NRPA has an affiliate organization in each state and the District of Columbia.

7. The National Trust for Historic Preservation in the United States was chartered by Congress in 1949 as a private nonprofit organization to protect and defend America's historic resources. The National Trust's congressional mandate is to further the historic preservation policy of the United States and to preserve sites, buildings, and objects significant in American history and culture. 16 U.S.C. § 468. The National Trust has its headquarters in Washington, D.C., and has six regional offices around the

country, including one in San Francisco. The National Trust has approximately 175,000 individual members and 1500 member organizations involved in regional and local preservation activities. Of the Trust's individual members, approximately 16,000 live in California. The National Trust has a vital interest in land-use regulation as an essential tool to encourage preservation and conservation in the land-use planning process.

8. The Natural Resources Defense Council, Inc. (NRDC) is a nonprofit membership corporation organized under the laws of New York State, with offices in New York, New York; Washington, D.C.; and San Francisco, California. NRDC has approximately 55,000 members residing in all states of the United States. NRDC is dedicated to preservation and protection of the human environment. One of NRDC's principal areas of involvement has been in the protection and wise management of the nation's land resources. For example, NRDC has worked for passage and implementation of a number of state wetland and coastal protection statutes. NRDC also has participated in a number of cases in support of local and state land-use controls which have been challenged on "takings" grounds. Because of the importance of the "taking" issue raised in this case, NRDC and its members have a direct interest in this litigation.

9. Preservation Action is a nonprofit organization located in Washington, D.C., which actively participates in the legislative process. Preservation Action encourages the protection of historic buildings and districts, the protection of neighborhoods, and the promotion of neighborhood conservation.

10. The Sierra Club is a nonprofit corporation organized in 1892 and existing under the laws of California, with its principal place of business in the City and County of San Francisco, California. The Sierra Club is a national conservation organization of more than 394,000 members. The

Sierra Club was organized to study, protect, explore and enjoy natural and scenic resources and to practice and promote the responsible use of the earth's ecosystems and resources. Sound land-use planning is one of the Sierra Club's most important goals.

AMICUS CURIAE

BRIEF

10
No. 85-1199

FILED

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JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH
OF GLENDALE, A California Corporation,
Appellant,
v.

THE COUNTY OF LOS ANGELES,
Appellee.

On Appeal from the Court of Appeal of California

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NATIONAL ASSOCIATION OF COUNTIES,
NATIONAL LEAGUE OF CITIES,
INTERNATIONAL CITY MANAGEMENT ASSOCIATION,
U.S. CONFERENCE OF MAYORS,
NATIONAL CONFERENCE OF STATE LEGISLATURES,
AND THE NATIONAL GOVERNORS' ASSOCIATION;
JOINED BY THE AMERICAN PLANNING ASSOCIATION
AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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QUESTIONS PRESENTED

1. Whether this Court should review, by appeal or certiorari, the dismissal by a state court of an inverse condemnation claim predicated on a facial challenge under the state constitution to a land use regulation.
2. Whether a "taking" occurs when the use of flood prone land is restricted by regulations that protect the public health and safety.
3. Whether the Takings Clause mandates payment of just compensation as the remedy for the "taking" of property by excessive land use regulation.

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**BRIEF OF THE
NATIONAL ASSOCIATION OF COUNTIES,
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JOINED BY THE AMERICAN PLANNING ASSOCIATION
AS *AMICI CURIAE* IN SUPPORT OF APPELLEE**

INTEREST OF *AMICI CURIAE*

The *amici* are organizations whose members include state, county, and municipal governments and officials throughout the United States, and the American Planning Association, an organization of city and regional planners and officials concerned with planning and orderly urban development. *Amici* and their members, therefore, have a vital interest in the legal issues that affect the powers and responsibilities of state and local government to regulate land use in the public interest.

Governments regulate land for many purposes; one of the most essential is protecting the health and safety of their citizens. The Los Angeles County ordinance at issue here was enacted following a devastating flood in which ten lives were lost and many buildings on this and other properties were swept away. The ordinance was designed to prevent future loss of life and property by restricting development within the limits of the Mill Creek flood protection area.

The problems addressed by the ordinance are not unique to Los Angeles or to California. Seven percent of the land area of the United States and 20,000 communities are located in flood plains. Each year, about 200 lives are lost and billions of dollars' worth of property is destroyed by flooding.¹ In 1968, in order to integrate federal, state, and local efforts to reduce flood hazards and alleviate the suffering caused by floods, Congress enacted the National Flood Insurance Act, 42 U.S.C. § 4001 *et seq.* The Act provided for flood insurance and encouraged state and local governments to reduce flood damage by guiding development away from flood threatened locations. The Los Angeles County ordinance is but one of myriad similar ordinances enacted in compliance with the Act.

Appellant claims that the ordinance effected a taking of its property and seeks just compensation for that property. The appeal levels a challenge against the so-called "California rule" that the validity of a land use ordinance must be determined by declaratory judgment or mandamus proceedings, not by a suit in inverse condemnation for just compensation. *Agins v. City of Tiburon*, 24 Cal.3d 266 (1979). *Amici* are concerned because the implications of a reversal of the judgment under re-

¹ U.S. Water Resources Council, 3 *Regulation of Flood Hazard Areas to Reduce Flood Losses* 9 (1982) (hereinafter "*Water Resources*"). By the end of the 1970s, mean annual flood losses approached \$4 billion. *Id.* at 13.

view go far beyond the fate of a single flood control ordinance in Los Angeles County.

First, *amici* are concerned with the procedural aspects of this case. Appellant's tardy assertion of federal constitutional rights is disrespectful and disruptive of orderly state court proceedings. Moreover, to find jurisdiction on the facts of this case would be inconsistent with appropriate notions of comity concerning review in this Court of the judgment of a state court rejecting a claim under the state constitution.

Second, a decision by this Court that building restrictions imposed by a flood plain ordinance "take" property and that the remedy required is payment of just compensation would impair the ability of government at all levels—federal, state, and local—to address the threat posed by floods or to ameliorate their consequences. Because the liability to pay just compensation would not necessarily be limited to flood control measures, such a decision could paralyze governmental efforts to regulate land use to protect the public health and safety from a host of other injuries as well.

A decision compelling a government to purchase property because it once imposed health or safety regulations, later found by a court to constitute a taking, would repudiate long-standing constitutional principles. In the wake of such a decision, claims for compensation based on alleged adverse effects of ordinary health and safety regulations on private property or business interests would multiply, overloading court dockets and threatening bankruptcy for state and local governments.

Because of *amici's* deep concern about the outcome of this case and its implications for public health and safety regulation, *amici* submit this brief to assist the Court in its resolution of the issues.²

² Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

STATEMENT OF THE CASE

First English Evangelical Lutheran Church of Glendale, the appellant, owns twenty-one acres of land straddling Mill Creek in the Angeles National Forest in the mountains north of Los Angeles in Los Angeles County. Appellant used this property as a camp, called Lutherglenn, for weekend retreats, summer camp, and a recreational area for handicapped children. Over the years, a dining hall, two bunkhouses, a caretaker's lodge, and an outdoor chapel were constructed, primarily by church members, on a flat twelve-acre portion of the property located on the flood plain in a narrow canyon. Jurisdictional Statement ("J.S.") Appendix ("App.") A2. These twelve acres suffered damage from flooding in 1969; other properties on the flood plain were damaged in 1972 as well.³

In July 1977, a 3,860-acre area upstream from Lutherglenn was razed by a forest fire, increasing the flood hazard to properties located in the canyon.⁴ In 1978, a storm dropped eleven inches of rain within two days in the watershed area; the storm runoff overwhelmed the capacity of the channel and the culverts in the Angeles Forest Highway and swept on downstream, flooding Lutherglenn, destroying its buildings, and killing ten people in a nearby resort. *Id.* A2-A3; Joint Appendix ("J.A.") 39.

To prevent future flood damage, Los Angeles County enacted a temporary moratorium on construction in the Mill Creek area. Ordinance No. 11,855. Three years later, after careful study, and in compliance with the

³ Reporter's Transcript ("R.T." 410-11); Second Amended Complaint, Exh. A, at 2-3 (August 4, 1977, Memorandum of Los Angeles County Flood Control District).

⁴ See J.S. App. A2. In this particular case, the County Flood Control District estimated after the fire that the water flow in the Mill Creek Channel would be two and one-half times greater because of the fire. R.T. 824, Exh. 10. The U.S. Forest Service warned of dangers from floods and erosion. R.T. 544.

National Flood Insurance Act, the County imposed permanent regulation by designating the Mill Creek area as a flood protection district.⁵ That designation made applicable to Mill Creek the County's restrictions on building in flood plains. 22 L.A. Cty. Code § 22.44.210 *et seq.*

Specifically, those restrictions identify the types of uses that are permissible⁶ and also permit "[a]ccessory buildings and structures that will not substantially impede the flow of water, including sewer, gas, electrical, and water systems, approved by the County Engineer pursuant to Section 308" of the County Code, Title 26.⁷ Section 308, in turn, permits buildings in flood control areas if they meet standards set by the County Engineer and will not cause hazards to adjacent property.⁸

⁵ Ordinance No. 12,413; 22 L.A. Cty. Code § 22.44.230. The Mill Creek flood protection area is one of many areas subject to flood in Los Angeles County. The original ordinance establishing flood protection districts for the County was enacted in 1927 (*id.* § 22.44.210) and has been amended a number of times as awareness of flood hazards increased. Mill Creek has also been included in the federal government's flood insurance study of Los Angeles County, which is used to "update existing flood plain regulations as part of the regular program of flood insurance by the Federal Emergency Management Agency (FEMA)." FEMA, 1 *Flood Insurance Study, Los Angeles County, California—Unincorporated Areas* 1 (1985).

⁶ 22 L.A. Cty. Code § 22.40.190. Appellant's property is zoned R-R-2, a classification permitting campgrounds and many other recreational and agricultural uses, single family residences, and "[a]ccessory buildings and structures customarily used in conjunction." *Id.* § 22.40.200. Further uses are permitted if site plans are approved by the planning director (*id.* § 22.40.210) or with a conditional use permit. *Id.* § 22.40.220.

⁷ *Id.* § 22.44.220. An accessory building is defined as "a detached subordinate building or structure, the use of which is customarily incidental to that of the main building or to the main use of the land, and which is located in the same or a less restrictive zone, and on the same lot or parcel of land with the main building or use." *Id.* § 22.08.010 (emphasis added).

⁸ 26 L.A. Cty. Code § 308 (a) (1), set forth in Appellee's Separate Appendix A23.

These ordinances are part of a network of regulations that affect thousands of communities in flood prone areas across the country. Much of the damage caused by floods results from debris carried downstream by the force of the water. Poorly anchored buildings at flood level, torn from their foundations and swept downstream, destroy other buildings and kill or injure people.⁹ Thus, in the last two decades, Congress, the States, and local governments have adopted a variety of resources protection and flood management programs to prevent this type of loss.

The National Flood Insurance Act¹⁰ was enacted by Congress in 1968 to integrate federal, state, and local efforts to reduce flood hazards and alleviate the suffering caused by floods.¹¹ The Act makes flood insurance available at sharply reduced rates to property owners in those communities that have adopted regulations to guide development away from locations threatened by flood. Local regulation generally takes the form of flood plain ordinances, including building codes, restricting the type, location, and density of use, designed to reduce flood losses.

Flooding from rainfall and snowmelt in the mountains is a "serious problem in Southern California."¹² California's flood plain management law, the Cobey-Alquist Act, enacted in 1965, establishes minimum standards for local regulations but leaves the primary responsibility to

⁹ R. Platt, *et al.*, *Intergovernmental Management of Flood Plains* 16-19 (1980).

¹⁰ 42 U.S.C. § 4001 *et seq.*

¹¹ See *Water Resources* 1-7. According to the Water Resources Council, flooding is the most widespread geophysical hazard. *Id.* at 15-22, 61-71. The federal government identifies 20,000 communities as flood prone, although other experts estimate that the number may be as large as one-half of all U.S. communities. Conservation Foundation, *Flood Hazard Management and Natural Resources Protection* 11 (1980). Floodplains contain an estimated 6.4 million dwelling units as well as considerable non-residential development. *Ibid.*

¹² *Water Resources* at 104.

local and regional governments to adopt and enforce appropriate land use regulations.¹³ Local flood plain regulations are required to prohibit the "[c]onstruction of structures in the designated floodway which may endanger life or significantly restrict the[ir] carrying capacity." Cal. Water Code § 8410(a). The law permits agricultural, recreational, and open space uses.¹⁴ The Los Angeles County Code chapters on "Floodways and Water Surface Elevations"¹⁵ and "Flood Protection Districts,"¹⁶ including the ordinance at issue in this case, were enacted in furtherance of the Cobey-Alquist Act and the National Flood Insurance Act.

In May 1978, appellant filed a claim for damages with the County and the Flood Control District, alleging negligence in the design and maintenance of the culverts, and inadequate flood protection. When the claims were denied, appellant sued the County and the Flood Control District in the Superior Court of Los Angeles County, claiming that the damage to Lutherglenn constituted a taking without payment of compensation in violation of Art. 1, § 19 of the California Constitution, which permits the taking of property only upon payment of just compensation. Of the three claims presented to the trial court, only one is relevant here.¹⁷ Appellant alleged that the "County ordinance adopted after the flood constituted an unconstitutional taking of property by prohibiting all

¹³ Cal. Water Code § 8400 *et seq.*; 23 Cal. Admin. Code § 200 *et seq.*

¹⁴ 23 Cal. Admin. Code § 221.

¹⁵ 11 L.A. Cty. Code § 11.60.

¹⁶ 22 L.A. Cty. Code § 22.44.210 *et seq.*

¹⁷ The two other claims were allegations that the defendants were liable for controlling the drainage channel and a highway over the channel and maintaining the highway as a dangerous condition; and that the District had engaged in cloud seeding, giving rise to liability in tort and inverse condemnation. J.S. App. A3-A4. Appellant notes that these issues were resolved in the County's favor and concedes that they present no federal question. Brief for Appellant ("Br.") 3 n.5.

use of Lutherglen's 21 acres." J.S. App. A4. The trial court dismissed this claim under authority of *Agins v. City of Tiburon*, 24 Cal.3d 266 (1979), *aff'd*, 447 U.S. 255 (1980), which held that a claim of regulatory "taking" could be asserted only by way of an action for mandamus or declaratory relief.

The California Court of Appeal affirmed on this issue. Rejecting appellant's reliance on the dissent in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1981), the court found that this Court had not yet ruled "on the question of whether a state may constitutionally limit the remedy for a taking to nonmonetary relief," and therefore held that the California Supreme Court's decision in *Agins* was controlling. J.S. App. A16.

SUMMARY OF ARGUMENT

1. Appellate jurisdiction in this case was invoked upon a misdescription of the issue actually presented and decided in the California courts. Appellant did not timely raise any question concerning the validity of any state statute under the *federal* Constitution. The state courts decided only that, under the California Constitution, appellant's claim that its property had been deprived of economic value by the County's flood control ordinance could not be litigated in an inverse condemnation proceeding. Appellant's prayer for just compensation amounts to a claim that it was denied its Fifth Amendment rights, which is not an appealable question. Even if state precedent may be deemed a state "statute" within the meaning of 28 U.S.C. § 1257(2), the Court of Appeal's reference to the absence of any controlling federal precedent could not transform the decision from a ruling on state law to the resolution of a federal constitutional challenge. A finding of appellate jurisdiction in this case is precluded by considerations of comity with the state courts, which are, under our constitutional system, the final arbiters of state law claims.

Nor is this case suitable for the grant of certiorari. The only substantial federal question posed concerns the

validity of the "California Rule," derived from *Agins*, that a suit for just compensation is not the appropriate procedure for challenging an alleged regulatory "taking"; and that question is not ripe for decision. *Agins*; *MacDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561 (1986).

2. The County's flood control ordinance did not effect a regulatory "taking" of appellant's property. Under principles firmly established by this Court, appellant's taking claim is not ripe for review by this Court. Notwithstanding appellant's allegation that it is deprived of all use of its property, the current regulatory scheme plainly allows some uses; and there has been no decision concerning the sufficiency of those permissible uses.

Moreover, analysis of the known facts in light of the factors used by this Court to evaluate taking claims demonstrates that there has been no taking. Regulation to protect the public health and safety is the type of governmental action to which the Court has paid the greatest deference against takings claims raised by competing private interests. The County's flood control regulations, moreover, bestow benefits on appellant as well as the general public. The economic impact of the County's regulatory action must be assessed under the current regulatory scheme, which does permit some use, and also in light of the damage caused by the 1978 flood, for which appellant attempted to hold the County responsible in the California courts. Finally, appellant cannot reasonably claim to have an investment-backed expectation that the County would not impose flood control regulations in an area zoned for limited use, that had been repeatedly ravaged by floods, and had become subject to an enhanced risk of flooding.

3. The California rule rests upon the distinction between "takings" resulting from excessive police power regulation and takings through the exercise of the power of eminent domain. The rule is fully consistent with the requirements of the Fifth Amendment and the decisions

of this Court. If regulation is invalid because it intrudes so far on protected rights as to be confiscatory, the government may choose to continue the regulatory scheme by exercising the power of eminent domain and purchasing the property for just compensation. Alternatively, the government may choose to rescind or amend the excessive regulation rather than incur liability to purchase the property. The decision to exercise the power of eminent domain cannot be judicially made, and the obligation to purchase by condemnation cannot be judicially imposed.

ARGUMENT

I. THIS CASE IS NOT PROPERLY BEFORE THE COURT.

Appellant has described this case as a "companion" (J.S. i) to *MacDonald* (106 S.Ct. at 2562), which raised the issue whether "rejection of a [land use] proposal deprived [the landowner] of its property without just compensation contrary to the Fifth and Fourteenth Amendments." In its present posture, however, this case does not pose that issue. Nor does the case pose any other question that would bring this case within the Court's appellate jurisdiction.¹⁸ And because no federal question is properly presented, neither is the case appropriate for the grant of certiorari.

A. The Appeal Should Be Dismissed For Want Of Jurisdiction.

An appeal to this Court from a judgment of a state court under 28 U.S.C. § 1257(2) lies only when the constitutionality of a state statute (or local ordinance¹⁹) is

¹⁸ Although we argue that the case is not a proper appeal, we will continue "to refer to the parties herein as appellant and appellees to minimize confusion." See *Kulko v. California Superior Court*, 436 U.S. 84, 90 n.4 (1978).

¹⁹ See *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 591 (1962). For convenience, we will refer throughout this discussion only to state statutes, but we intend the discussion to refer as well to local ordinances.

"drawn in question" and upheld against the claim that it is "repugnant to the Constitution . . . of the United States." It is sufficient if the state court holds the statute applicable to a particular set of facts in the face of a challenge that it is unconstitutional as applied (*Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 440-41 (1979)), but it is not sufficient if the challenge is based not on the validity of the statute, but rather on a claim of rights under the Constitution (*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 562-63 n.4 (1980)). In other words, appeal to this Court lies when a state statute, either on its face or as applied, is claimed to be void under the federal Constitution, but not when the claim is that the application of an otherwise valid state statute would violate the plaintiff's federal rights.²⁰

Appellant has not satisfied this jurisdictional prerequisite. Appellant claims that "a local ordinance was challenged as violating the U.S. Constitution and the ordinance was upheld." J.S. 3. But it is impossible to identify among the profusion of arguments that appellant put forth in the state courts any challenge to the validity of the County ordinance on federal constitutional grounds. The complaint did not mention the federal Constitution, but instead expressly invoked Article I, § 19 of the California Constitution as the basis for appellant's alleged right to just compensation. The trial court dismissed this claim based on the California Supreme Court's construction in *Agins* of California law.

The California Court of Appeal also noted that state law alone provided the basis for appellant's claim to compensation. J.S. App. A3-A4.²¹ That court affirmed

²⁰ See generally R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 3.4(b), at 112-13 (6th ed. 1986), and cases cited in n.26, *infra*.

²¹ In the Court of Appeal, appellant attempted to cure this glaring procedural defect by the statement (Opening Brief 42 n.15) that "[t]he fact that the Amended Complaint alleged a violation of the California Constitution rather than the U.S. Constitution" was

the trial court's determination that the *Agins* rule barred appellant's claim under the *California* constitution, noting that this Court had not determined whether the *Agins* rule was inconsistent with Fifth Amendment rights. Thus, the Court of Appeal, rather than deciding a federal constitutional question, decided that no federal question was presented.

Only in its petition for review to the California Supreme Court did appellant suggest that the ordinance might be invalid under the Fifth Amendment. That court denied review, and consequently neither reached the federal constitutional claim nor upheld the validity of the ordinance against that claim.²² In this Court, appellant does not challenge the constitutionality of the County ordinance. Appellant asserts instead that "the only issue in this case is whether the U.S. Constitution permits a state to prohibit the recovery of just compensation as a remedy for a regulation which denies economically viable use of property." Br. 14.²³

"irrelevant, as federal law determines both." Appellant also argued that the trial court erred in applying the California Supreme Court's decision in *Agins* because that decision linked the interpretation of the California Constitution to this Court's interpretation of the federal Constitution, and in *San Diego*, five Justices of this Court had concluded that an inverse condemnation remedy was constitutionally required. *Id.* at 42-45. The question whether this Court's decision in *San Diego* overruled its prior decision in *Agins* is not a substantial federal question. See *United States v. Riverside Bayview Homes, Inc.*, 106 S. Ct. 455, 460 n.6 (1985) (noting that the compensation question has not been resolved).

²² The denial of review does not constitute a rejection on the merits of the federal claim. *People v. Triggs*, 8 Cal.3d 884, 890 (1973); cf. *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952).

²³ Thus, appellant's charge of invalidity is leveled not at the ordinance, but at the "California rule," derived from *Agins*. It is not at all clear that the application of a state precedent to a question of state law is a state "statute" within the meaning of 28 U.S.C. § 1257(2).

In *Agins* itself, this Court unanimously held that the constitutional question of the right to "just compensation" was not ripe for decision because the fact and the extent of the alleged "taking"

In fact, it is clear from the nature of the relief that appellant seeks—just compensation—that it is not challenging the validity of the ordinance under federal law. Just compensation becomes payable when the government exercises its power of eminent domain to acquire property or property rights. If the government, in the exercise of its power of eminent domain, takes property without paying just compensation, the Takings Clause is violated, but the acquisition itself is not invalid. Rather, the infirmity must be cured by the payment of just compensation. See, e.g., *United States v. Causby*, 328 U.S. 256 (1946); *Hurley v. Kincaid*, 285 U.S. 95 (1932). Conversely, if the taking is not a proper exercise of the power of eminent domain, the remedy is not the payment of just compensation, but the return of the property.²⁴ A landowner claiming just compensation for property taken by the government must proceed on the assumption that the government has otherwise validly exercised the sovereign power of eminent domain.²⁵ In other words, appellant asserts not the invalidity of a state statute, but rather claims the deprivation of a federal right to compensation—not an appealable question.²⁶

had not been determined. Yet appellant, in circumstances no more ripe than *Agins* itself, insists that the Court of Appeal's reliance on *Agins* brings this case within this Court's appellate jurisdiction. Surely, if that were sufficient, the Court would have addressed the merits in *Agins*, in preference to inviting a host of additional appeals.

²⁴ See discussion in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984), of circumstances under which even the government's compensated taking of property must be invalidated.

²⁵ See *United States v. Riverside Bayview Homes*, 106 S.Ct. at 459; *Ruckelshaus v. Monsanto Co.*, 104 S.Ct. 2862, 2880 (1984); *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981); *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 127 n.16 (1974); *Yearsley v. Ross Constr. Co.*, 309 U.S. 18, 21 (1940); *Hooe v. United States*, 218 U.S. 322, 336 (1910).

²⁶ *Calder v. Jones*, 465 U.S. 783, 787-88 n.7 (1984); *Richmond Newspapers, supra*; *Kulko, supra*; *Hanson v. Denckla*, 357 U.S. 235, 244 (1958).

Only the reference by the Court of Appeal to this Court's decision in *Agins* suggests an appealable issue. But there is presumed implicit in every state court decision a determination that it is consistent with federal constitutional law and this Court's decisions. In this case, the Court of Appeal merely chose to make that determination explicit. Such expression by a state court of the view that its decision is not inconsistent with the decisions of this Court concerning the requirements of federal law surely cannot suffice as the basis of an appeal under 28 U.S.C. § 1257(2). Congress could not have intended to allow appeals from every judgment of a conscientious state court that gratuitously expresses compliance with federal law. Considerations of comity also militate against allowing an appeal. The transformation of state law claims into federal issues by the mere statement of a state court that this Court has announced no contrary federal rule would intrude too deeply into state court prerogatives over state law issues. See *Osborne v. Clarke*, 204 U.S. 565, 568-69 (1907).

B. This Case Is Not Appropriate For Certiorari.

Should the Court agree that there is no appellate jurisdiction under the circumstances of this case, and treat the jurisdictional statement as a petition for certiorari (see 28 U.S.C. § 2103), that petition should be denied. The state courts simply did not decide "an important question of federal law which has not been, but should be, settled by this Court" or "a federal question in a way in conflict with applicable decisions of this Court." Supreme Court Rule 17.1(c).

There are three questions now before the Court.²⁷ The first—"When a local government agency regulates private property in such a way that no economically viable use is left to the owner, has the property been taken within the

²⁷ Appellant now states (Br. 17) that "the remedy question in this case . . . is the only issue presented." We discuss the other issues as well, notwithstanding this apparent acknowledgement that they are not properly before the Court.

meaning of the Fifth and Fourteenth Amendments to the Constitution?"—as we have shown, was neither presented to nor decided by the state courts. Moreover, the question assumes a finding that has never been made, namely, that no economically viable use is possible. If there is any issue that this Court's recent takings decisions have settled, it is that a taking question cannot be decided on a facial challenge, that is, without a final determination how the specific land use measure applies to the specific property. See *MacDonald, supra*; *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 105 S.Ct. 3108 (1985); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981); *Agins, supra*.

The second question—"When property is taken by the regulatory action of a local government agency, is just compensation an appropriate remedy?"—does not raise a federal claim.²⁸ A federal question arises only from appellant's contention that just compensation is the *only* appropriate remedy, which appears to be formulated in the third question presented: "Does California's unique rule, that just compensation is never an appropriate remedy for a regulatory taking of property," violate the Takings Clause. This question, like the first, is prematurely raised. The Court has recently examined the California rule in three cases—*Agins*, *San Diego*, and *MacDonald*—and found it unnecessary or inappropriate to pass on the validity of that rule. This case provides no better occasion for addressing its constitutionality.

The only point made clear by the procedural history of this case is that appellant has evidently decided that, rather than attempt to redevelop the property for the recreational uses interrupted by the flood, it would pre-

²⁸ Appellant has changed this question in its brief to ask whether "just compensation is the proper remedy" (emphasis added). To the extent that the substance is different, of course, appellant would be confined to argument on the question presented in the jurisdictional statement. See *Irvine v. California*, 347 U.S. 128, 129 (1954).

fer to make a forced sale of the property to the County and use the money for development elsewhere. This may be an attractive alternative, but it does not properly present a federal question.

II. THERE HAS BEEN NO TAKING OF APPELLANT'S PROPERTY.

If the Court decides to reach the "taking" issue in this case, the judgment of the Court of Appeal should be affirmed. To find a taking under these circumstances would be flatly inconsistent with this Court's recent decisions exemplifying the proper approach to the determination of regulatory taking claims.

A. The Question Whether The County's Ordinance Has Taken Appellant's Property Is Not Ripe For Review.

This Court has frequently repeated Justice Holmes' statement, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), that "if regulation goes too far it will be recognized as a taking." See *United States v. Riverside Bayview Homes, Inc.*, 106 S.Ct. 455, 459 (1985), citing *Williamson County, supra*; and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). Accordingly, we assume, *arguendo*, that some land use regulation might be so excessive in its intrusion on protected private property rights as to be confiscatory. But the Court's regulatory taking cases "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald*, 106 S.Ct. at 2567.²⁹ The need for a "final decision" regarding permissible uses of the property is "compelled by the very nature of the inquiry re-

²⁹ As the Court noted in *Virginia Surface Mining*, 452 U.S. at 294-95, this requirement of specificity is a particularly important application of the general rule that "the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary" (citing *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 (1972); *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-75 (1947)).

quired by the Just Compensation Clause." *Williamson County*, 105 S.Ct. at 3119. Lacking such a final decision, "it is impossible to tell whether the land retain[s] any reasonable beneficial use or whether [existing] expectation interests ha[ve] been destroyed." *MacDonald*, 106 S.Ct. at 2566, citing *Williamson County*, 105 S.Ct. at 3118 n.11.

The procedural posture of this case makes this required analysis impossible. Briefly, part of appellant's property is now regulated by the flood control provisions of the County Code (R.T. 318, 475-76, 480; J.S. App. A2). The regulations limit appellant's right to build on its property, but do permit numerous uses, including accessory buildings.

Apparently, appellant does not wish to use its property; one month and ten days after the adoption of the temporary moratorium, appellant filed suit (J.A. 1), not to establish its rights to any particular use of the property, but to obtain just compensation. The complaint was based on the County's temporary moratorium on construction in the flood plain³⁰ and was never amended to reflect adoption of the permanent ordinance, which does allow some construction. Appellant's arguments and proof never addressed the question whether, with the permissible uses, the effect of the ordinance could still be deemed to constitute a taking. Rather, appellant continues to insist (Br. 15) that it has been deprived of all use of its property, although it has never sought a construction permit under the permanent regulations.³¹

³⁰ Br. 2, citing the complaint. The citations reflect challenges to Ordinance No. 11,855, the temporary moratorium. J.A. 12; J.S. App. A32.

³¹ Appellant minimizes the County Code provision permitting the construction of "accessory buildings," by arguing that there is no "main building" to which they could be "incidental." Reply Brief 3-4. Appellant ignores the reference to buildings incidental "to the main use of the land." 22 L.A. Cty. Code § 22.08.010. Because the land in question was used as a campground, there clearly may be "accessory" structures (*e.g.*, restrooms, refreshment stands, storage

This Court has made clear that the "mere assertion of regulatory jurisdiction by a governmental body does not constitute a taking." *Riverside Bayview Homes*, 106 S.Ct. at 459; *Virginia Surface Mining*, 452 U.S. at 293-97. The California courts never determined whether there was a taking because appellant did not properly seek such a determination. When those courts ruled that it could not litigate its claim in a suit for inverse condemnation, appellant did not pursue the claim by the means allowed under the California rule. Appellant has thus brought to this Court the question of the proper remedy for a wrong that has not been found to exist. Under the Court's cases, review of such a claim would be premature.

B. If Appellant's Taking Claim Is Reviewed It Must Be Rejected.

"As has been admitted on numerous occasions, this Court has generally been unable to develop any set formula for determining when justice and fairness require that economic injuries caused by public action must be deemed a compensable taking."³² *Ruckelshaus v. Monsanto Co.*, 104 S.Ct. 2862, 2874 (1984) (citations and internal quotation marks omitted). The Court has relied instead on "ad hoc, factual inquiries into the circumstances of each particular case." *Connolly v. Pension Benefit Guaranty Corp.*, 106 S.Ct. 1018, 1026 (1986). Beginning with *Penn Central*, *supra*, the Court has observed that three factors have "particular significance" in this determination: "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *PruneYard*

sheds) "customarily incidental to . . . the main use of the land." It is clear simply from the discussion of this issue by the parties that the effect on appellant's property of the County Code provisions has not been determined.

³² As we discuss in Part III of this brief, we believe that the concept of "taking" in the context of regulation is unfortunately confusing. This section of the brief, however, engages in the traditional analysis.

Shopping Center v. Robins, 447 U.S. 74, 83 (1980). When those factors are applied in this case, it is clear that there has been no taking.

1. The Character of the Governmental Action.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430 (1982), the Court noted that "recent cases confirm the distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property." Of all types of governmental action that affect real property, land use regulation is the least likely to constitute a taking. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124 (citations omitted). This Court has repeatedly held that reasonable land use regulations do not require just compensation.³³

The flood control ordinance under attack in this case is mere regulation of land. Through such regulation, the County does not occupy or invade appellant's land, nor does the regulation have the effect of excluding appellant from or admitting others to its land. The regulation does not divest appellant of its proprietary rights in the land, nor create such rights in the County. In short, the County acquires nothing through the regulation. See *Connolly v. PBGC*, 106 S.Ct. at 1026 (1986). The flood control regulations are merely "a public program that adjusts the benefits and burdens of economic life to promote the common good and . . . does not constitute a taking requiring Government compensation." *Ibid*.

³³ *Virginia Surface Mining*, *supra* (steep slope mining); *Penn Central*, *supra* (historic landmark); *City of Eastlake v. Forest City Enter.*, 426 U.S. 668 (1976) (referendum on zoning); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (zoning for one-family dwelling); *Goldblatt v. Town of Hempstead*, *supra* (zoning); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (zoning); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (zoning).

The flood control provisions of the County Code were adopted as part of an integrated system of federal, state, and local regulation to protect the public from the risks and consequences of floods. The adjustment of the benefits and burdens in this case benefits taxpayers by reducing the costs attendant to flood losses, but it also benefits appellant and other owners of flood prone property that is regulated by the ordinance. The landowners become eligible for low cost flood insurance; they are protected by flood control activities undertaken by federal, state, and local governments; and they are protected against hazards from debris washed down from properties upstream.³⁴

These flood control measures exemplify police power regulations enacted by government at all levels to benefit the public as a whole. Such regulations represent the very essence of government: protection of the health and safety of its citizens. Thus, it is not surprising that this Court has paid the greatest deference to government regulations that address health and safety concerns against takings claims alleged by competing private interests. See, e.g., *Miller v. Schoene*, 276 U.S. 272, 279 (1928).

2. The Economic Impact.

With regard to land use regulations that are "reasonably related to the promotion of the general welfare," the Court's cases "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking.'" *Penn Central*, 438 U.S. at 131, citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in value); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) 87½% diminution in value). This rule necessarily follows from Justice Holmes' admonition that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying

³⁴ See *Agins*, 447 U.S. at 262 (in assessing the fairness of a zoning measure, the benefits received from regulation must be weighed against the burdens imposed.)

for every such change in the general law." *Pennsylvania Coal v. Mahon*, 260 U.S. at 413.

The only apparent *caveat* to this firmly established rule is the recent suggestion that if the economic impact is so severe that it deprives the landowner of all "economically viable use of his land," the regulatory measure would constitute a taking. E.g., *Agins*, 447 U.S. at 260, citing *Penn Central*, 438 U.S. at 138 n.36; *Virginia Surface Mining*, 452 U.S. at 296. The difficult questions regarding the significance and the precise contours of this *caveat* need not, however, be addressed in this case. Although appellant has alleged that it has been denied all economically viable use of its land, the record refutes that claim. The ordinance applies only to a part (twelve of twenty-one acres) of appellant's property. There is no showing that any economically viable use was made of the property before it was regulated,³⁵ and no findings concerning the economic effect of the flood control ordinances on appellant's property.

Appellant attempts to cure these deficiencies (1) by relying on the language of the temporary moratorium, which is no longer in effect; and (2) by insisting that the County "has not challenged" that the ordinance precludes all use of Lutherglen. Br. 15. California law precludes any such attempted cure.

Appellant's claim that the "ordinance precludes all use of Lutherglen" is patently contradicted by current law. The temporary moratorium expired on August 11, 1981, and the permanent regulations allow certain uses as of right, and additional uses and construction when authorized by the County Engineer. The resolution adopted by the Regional Planning Commission, which recommended the addition of the Mill Creek Area to the

³⁵ Although we discuss "economic impact" and, later, "investment-backed expectations," it is not clear what significance these concepts have in this case. Appellant is a non-profit religious corporation, not a business conducted for profit; and the summer camp at Lutherglen was a charitable, rather than a profit-making, venture.

County's flood protection districts, found that "all the affected parcels still will have buildable areas." Appellee's Separate Appendix A1.³⁶

Appellant fares no better by its attempts to characterize the motion to strike its allegations concerning the ordinance as admissions. The motion to strike was filed because the allegations were irrelevant (J.A. 20, 21-22), not because they were true. This Court has also noted that under California law, even a demurrer does not "admit contentions, deductions or conclusions of fact or law." *MacDonald*, 106 S.Ct. at 2564 n.3 (citations omitted).

Appellant's contention that the County's regulatory action deprived its property of all economically viable use is plainly contradicted not only by the regulatory scheme, but also by the record facts concerning the economic impact on the property of the 1978 flood. Before the flood, appellant enjoyed the use of the property and its improvements for weekend retreats, summer camp, and other recreational activities. The flood destroyed the buildings on appellant's property and caused ten deaths in the area. Indeed, in the state courts, appellant argued that the County's negligence was responsible for causing or failing to limit the extensive damage that its property suffered in the flood. Appellant now seeks to attribute its entire loss to the County's regulatory efforts to prevent or contain future flood damage. It would defy common sense to accept appellant's contention that the County's post-flood regulation destroyed the value of appellant's property, while ignoring the devastation caused by the natural catastrophe. As this Court has noted, the Fifth Amendment "does not undertake . . . to socialize all losses, but those only which result from a taking of

³⁶ This Court has noted that "[u]nder California practice, allegations in a complaint are taken to be true unless 'contrary to law or to a fact of which a court may take judicial notice.' . . . California courts may take judicial notice of municipal ordinances." *Agins*, 447 U.S. at 259 n.6 (citations omitted).

property." *United States v. Willow River Co.*, 324 U.S. 499, 502 (1945).

3. Reasonable Investment-Backed Expectations.

The Court has identified the extent to which a regulation interferes with "reasonable investment-backed expectations" as an aspect of economic impact that is particularly relevant to the taking inquiry. See *Prune-Yard*, 447 U.S. at 83; *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979). The Court has made clear that the expectations must be derived from a specific, protected property right. E.g., *Monsanto*, 104 S.Ct. at 2878; *Kaiser Aetna*, *supra*. A "mere unilateral expectation or an abstract need is not a property interest entitled to protection." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980).

In this case, appellant owns property located in part on a flood plain that was zoned for limited use before it became subject to flood control regulation. The area had been swept by floods three times in nine years; and appellant's property had been damaged twice. The risk of future flooding, always substantial, was increased because of the 1977 fire upstream. The location of the property must have made appellant anticipate flood control regulation. In fact, the County is obligated by state law to limit development in flood prone areas,³⁷ and significant federal benefits depend on such regulation.

Thus, even before the 1978 flood, appellant could not have laid claim to a reasonable investment-backed expectation that the use of its land would not be restricted for flood control purposes. Since the flood, appellant has not even attempted to resume the use of its land, although some use is clearly permitted. By seeking, instead, to unload the property onto the County, appellant expresses its own judgment that it is the geographical

³⁷ Cal. Water Code § 8411 requires local and regional agencies to "establish the necessary flood plain regulations . . . within one year following notification."

vulnerability of the land—not the County's regulation—that makes the property unsuitable for its use.

III. THE "CALIFORNIA RULE" IS CONSISTENT WITH THE FIFTH AMENDMENT.

Only if this Court concludes that appellant's property has been taken is the question of the appropriate remedy posed. Appellant challenges the "California rule," derived from *Agins* (24 Cal.3d at 273), that "a landowner alleging that a zoning ordinance has deprived him of substantially all use of his land may attempt through declaratory relief or mandamus to invalidate the ordinance as excessive regulation in violation of the Fifth Amendment," but "may not . . . elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid." This rule, *amici* submit, is not only correct, but is fully consistent with the majority and dissenting opinions of this Court that have been invoked in support of the challenge.

In *amici*'s view, much of the difficulty in this area stems from imprecise terminology that clouds the distinction between the separate constitutional concepts of regulation and acquisition. Through regulation, government mediates among competing private uses and private rights, but acquires no rights or uses for itself. When police power regulations are found to be unlawful because they intrude excessively on protected private rights, they must be set aside. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

The exercise of the police power to regulate land must be carefully distinguished from the exercise of the government's power of eminent domain. When government exercises that power, it "acquire[s] unto itself a property right—an interest that is literally or effectively transferred and increases government's store of proprietary interests."³⁸ See *Connolly v. PBGC*, 106 S.Ct. at

³⁸ Stoebe, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 570 (1972).

1026. If the government acquires private property without paying just compensation, a violation of the Takings Clause of the Fifth Amendment results; and the government may be ordered to pay just compensation. *Monsanto*, 104 S.Ct. at 2880; *United States v. Causby*, 328 U.S. 256 (1946); *Hurley v. Kincaid*, 285 U.S. 95 (1932).

Confusion has arisen from the description of excessive regulation as a "taking." *E.g.*, *Andrus v. Allard*, 444 U.S. 51 (1979). In fact, in many cases, the issue separating the majority and dissenting opinions is whether a regulation has gone "too far" and thus has become a taking. *E.g.*, *Loretto*; *Penn Central*; *Pennsylvania Coal*; see *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962) ("There is no set formula to determine where regulation ends and taking begins."). Our point is not to dispute the general proposition that "if regulation goes too far it will be recognized as a taking" (*Pennsylvania Coal*, 260 U.S. at 415), although we note that the Court has never held that regulation of land, *per se*, amounts to a taking.³⁹ Our concern is rather that the failure to observe the substantive distinction between a regulatory "taking" through excessive use of the police power, and an eminent domain taking resulting from uncompensated acquisition of private property, has produced uncertainty concerning the remedies appropriate to each.⁴⁰

³⁹ *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), is the only case in which the Court has invalidated a zoning restriction. See Freilich, *Solving the "Taking" Equation: Making the Whole Equal the Sum of its Parts*, 15 Urb. L. 447, 454 (1983). The Court found that the zoning regulations were invalid as applied; the Court did not find a "taking" and did not require payment of just compensation.

⁴⁰ An additional danger in using the word "taking" in the context of land use regulation is its implication about the standard to be used in determining whether the regulation is constitutional. The concept of "taking" by regulation may be a useful shorthand for the conclusion that regulation has intruded too far on protected rights. This "shorthand," however, must not be allowed to obscure the principles that land use regulation is an exercise of the police power, and not the power of eminent domain; and that the standard by

When the government acquires property for its own use but fails to pay just compensation to the owner, its action violates the Takings Clause. The proper remedy is just compensation because the government has, in effect, exercised the sovereign power of eminent domain without observing the constitutional requirement of just compensation. It is not the taking, but the failure to pay compensation, that constitutes the violation. In contrast, when government regulation is excessive, the proper remedy is invalidation, precisely because the government is acting beyond its authority. "Taking" in the context of regulation merely indicates the point at which the government's attempted reliance on the police power is invalid, and the government must therefore resort to its power of eminent domain.⁴¹ A successful challenge to a regulatory measure depends upon a finding that the measure itself is *ultra vires*; such a measure cannot form the basis for an obligation on the part of the government to purchase the affected property.

Once a regulation has been declared excessive and therefore invalid, the government may decide to achieve its regulatory objective by exercising the option to purchase the affected property through its eminent domain power. At that point, of course, government incurs the obligation to pay just compensation. But the decision to

which the validity of such regulation is measured is that generally applicable to police power regulation. There is nothing magical about land use regulation that distinguishes it from any other kind of police power regulation in the evaluation whether it goes too far. A rational relationship between reasonable, nonarbitrary regulations and a permissible state objective is all that is required. See *Village of Belle Terre v. Boraas*, 416 U.S. at 8.

⁴¹ Given that the idea of a regulatory taking originated in *Pennsylvania Coal*, which did not involve the State, and in which just compensation thus could not have been awarded, it is inconceivable that the Court intended, by use of the word "taking," to create government liability for just compensation for those regulatory measures that "go too far." In *Pennsylvania Coal* itself, the Court simply ruled that the invalid measure could not be enforced in a private suit.

exercise the power of eminent domain cannot be judicially made, and the obligation to purchase by condemnation cannot be judicially imposed.

Those Members of this Court who have addressed the question of the appropriate prospective remedy for a regulatory "taking" have agreed.⁴² In Justice Brennan's words (dissenting in *San Diego*, 450 U.S. at 658) (citations omitted):

⁴² This case does not present the question of the availability of monetary relief for a so-called "temporary taking." Appellant argues that it has suffered a *permanent* taking that entitles it to just compensation for the full value of its property. Should the Court nevertheless address the question what monetary relief is due a landowner for a temporary restriction of the use of his property by excessive regulation, *amici* respectfully submit that "just compensation" cannot be appropriate. Members of this Court have suggested that excessive regulation, even though temporary, may constitute a "taking" for which "just compensation" must be paid. See dissenting opinions of Justice Brennan in *San Diego*, 450 U.S. at 653, and Justice White in *MacDonald*, 106 S.Ct. at 2573. These opinions, however, as we discuss in the text, have acknowledged that, when regulation is adjudged to go "too far," the government may choose whether to rescind the offending regulation or to condemn the property. A court order to the government to pay "just compensation" for a temporary taking would extinguish this right. Upon payment of "just compensation," the government would acquire the property. Thus, there would be nothing left to condemn, and no opportunity to rescind the regulation as an alternative to purchase.

Moreover, *amici* submit that no monetary relief should be available to a landowner simply because his land has been subject to regulation that is later adjudged excessive. No landowner has the right to use his land free from all regulation. See *Euclid v. Ambler Realty Co.*, *supra*. Nor does the delay incident to litigation challenging a land use measure deprive him of any property right, for the landowner is not protected against delay *per se*. Cf. *Agins*, 447 U.S. at 263 n.9; *Danforth v. United States*, 308 U.S. 271 (1939). In our highly regulated, complex society, delay is attendant to many dealings of the citizen with his government. It does not, however, effect a "taking" (see *Williamson County*, 105 S.Ct. at 3126 (Stevens, J., concurring)), but is simply "a burden borne to secure 'the advantage of living and doing business in a civilized community.'" *Andrus v. Allard*, 444 U.S. at 67, quoting *Pennsylvania Coal*, 260 U.S. at 422 (Brandeis, J., dissenting).

[N]othing in the Just Compensation Clause empowers a court to order a government entity to condemn the property and pay its full fair market value, where the "taking" already effected is temporary and reversible and the government wants to halt the "taking." Just as the government may cancel condemnation proceedings before the passage of title, . . . or abandon property it has temporarily occupied or invaded, . . . it must have the same power to rescind a regulatory "taking."⁴³

Therefore, the California courts properly declined to entertain appellant's suit for just compensation. Even if appellant could prove that the regulation of its property constitutes a "taking" because it is so excessive as to be confiscatory, appellant would not be entitled to just compensation, that is, a court order to the County compelling the purchase of its property. The County must decide whether it prefers to condemn the property or to modify or abandon the regulation.⁴⁴

⁴³ Justice White agrees, noting that he "assume[s] . . . that the normal action by the governmental entity following a determination that a particular regulation constitutes a taking will be to rescind the regulation. I believe that this is a permissible course of action, limiting liability for the taking to the interim period. . . . Of course, the governmental entity could actually condemn the property and pay permanent compensation for it." *MacDonald*, 106 U.S. at 2573 n.4 (dissenting opinion; citations omitted).

⁴⁴ The cases upon which appellant relies to support its argument "that compensation—not invalidation—is the proper remedy" (Br. 20) decided nothing to the contrary. In *Hurley v. Kincaid*, for example, there was an authorized taking of property which the government did not intend to forgo; the only infirmity was the government's failure to pay for it. 285 U.S. at 103-04. Plainly, the remedy was not to enjoin the taking, but to require the payment of compensation. Similarly, *Monsanto* (104 S.Ct. at 2880) and *Riverside Bayview Homes* (106 S.Ct. at 459-60) merely reflect the Court's long-standing practice to decline to entertain facial challenges to the enforcement of federal regulatory statutes said to present the threat of a taking. The Court further indicated that injunctive relief would not be appropriate if compensation were available.

The California rule simply requires a landowner alleging a regulatory taking to seek a judicial declaration that his property has, in fact, been taken. The relevant inquiry in such a suit is whether the regulation of particular property is excessive. If a "taking" is found, the government must then choose either to continue the regulation in effect (by exercising the power of eminent domain and paying just compensation⁴⁵) or to repeal the regulatory scheme or amend it to the extent necessary to avoid confiscation. The California rule is thus not only consistent with constitutional requirements; it is a sensible procedure to avoid some of the problems of finality that have plagued this Court in its recent takings cases (e.g., *Agins*, *San Diego*, *Williamson County*, and *MacDonald*).

CONCLUSION

For the foregoing reasons, the appeal should be dismissed and certiorari denied. Alternatively, the judgment of the Court of Appeal should be affirmed.

Respectfully submitted,

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⁴⁵ If compensation is not forthcoming, the property owner may resort to inverse condemnation, the landowner's substitute for an eminent domain proceeding (*Agins*, 447 U.S. at 258 n.2).

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
F I L E D

NOV 3 1986

JOSEPH F. SPANIOL, JR.
CLERK

18
No. 85-1199

**IN THE
SUPREME COURT
OF THE UNITED STATES**
October Term, 1986

**FIRST ENGLISH EVANGELICAL LUTHERAN
CHURCH OF GLENDALE, a California
corporation,**

Appellant,

vs.

COUNTY OF LOS ANGELES, CALIFORNIA,
Appellee.

**On Appeal From The Court Of Appeal Of California
Second Appellate District, Division Seven**

**BRIEF OF AMICUS CURIAE
CITY OF LOS ANGELES AND OTHER
JOINING CALIFORNIA CITIES IN SUPPORT
OF APPELLEE COUNTY OF LOS ANGELES**

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No. 85-1199

IN THE
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BRIEF OF AMICUS CURIAE
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JOINING CALIFORNIA CITIES IN SUPPORT
OF APPELLEE COUNTY OF LOS ANGELES

The City of Los Angeles, a political subdivision of the State of California, files this *amicus curiae* brief on the merits pursuant to Rule 36(4) in support of Appellee County of Los Angeles.

INTEREST OF AMICUS CURIAE

The City of Los Angeles, and the other California cities joining this brief (see Appendix A), are responsible for enacting and enforcing regulations to protect the health and safety of persons within their borders. Often, these regulations must restrict the uses of hazardous property or even prohibit altogether certain dangerous activities.

A decision by this Court that a reasonable health or safety measure might require the payment of compensation to persons whose property is so regulated would severely impair the ability of these cities to protect the lives and property of all their residents. Because of the magnitude of the issues involved in this appeal, the Board of Directors of the League of California Cities has authorized its member municipalities to add their names to this brief as *amici*.

STATEMENT OF THE CASE

Contrary to the appellant's urging, this is not the proper case in which to determine whether the over-regulation of land by zoning may result in compensation through an action for inverse condemnation.

The factual background of this case is not particularly complicated. Prior to 1978, the appellant operated a 12-acre camp in a narrow canyon along Mill Creek in the mountains north of Los Angeles. This camp, which contained several buildings and structures surrounded by recreational open space, was used by the appellant as a weekend retreat and summer camp. On February 10, 1978, a catastrophic flood inundated the camp. The flood killed ten people on property adjacent to the camp and resulted in massive damage to property along the creek, including all

of the buildings and structures on the appellant's property. Because of the dangerous condition of the property and the threat of death or injury which construction could pose, on January 11, 1979, the County adopted "an interim ordinance temporarily prohibiting the construction, reconstruction, placement or enlargement of any building or structure" within an interim flood protection area that included the camp. J.S., App.F., pp. A31-A32. On August 11, 1981, the County adopted another ordinance establishing the Mill Creek Flood Protection District and superseding the 1979 interim ordinance. J.S., App.F., pp. A32-A33. As set forth more fully in Appellee's Brief, the regulations governing flood protection districts, such as the one applicable to the appellant's camp, permit a wide range of recreational uses, including the construction of buildings and structures "accessary" to those uses. Moreover, certain other buildings may be constructed and additional uses may be made of the property after obtaining required approvals from the County. See Appendices B, D and G to Appellee's Brief. Thus, contrary to the conclusory allegation of the complaint, on their face the regulations applicable to the camp do not deprive the appellant "all use of Lutherglenn." J.A. 49.

ARGUMENT

The appellant has not challenged the reasonableness of the County's regulatory scheme. Instead, conceding the validity of the regulation, the appellant is asking the Court to rule that it is entitled to be compensated because the hazardous condition of its property has prompted the County to restrict the use of that property.

The County has done no more and no less than to tell the appellant that it may not build structures in a place where

to do so would expose people to an unreasonable risk of death or injury. On its face, the County's ordinance does not prohibit all uses of the appellant's camp; it does not even prohibit all construction. On the contrary, it merely requires that any buildings or other structures be located where they will be safe.

Conceding the validity of the County regulatory scheme, the appellant nevertheless urges a radical proposition, namely, that a reasonable regulation restricting the dangerous use of hazardous property should result in compensation to the owner by way of an action for inverse condemnation. This Court has never so held. Indeed, quite to the contrary, this Court has repeatedly upheld reasonable restrictions on the use of property as valid exercises of the police power. *See, e.g., Miller v. Schoene*, 276 U.S. 272, 277-280 (1928) (statute authorizing destruction of diseased cedar trees); *Sweet v. Rechel*, 159 U.S. 380, 398 (1895) ("... the state ... may, in some appropriate mode and without compensation to the owner, forbid the use of specified private property, where such use would be injurious to the public health.").

It has been a longstanding rule of constitutional jurisprudence that government may protect the health and safety of its citizens by restricting hazardous uses of property without compensating owners affected by those restrictions. The rule was well stated by this Court in *Mugler v. Kansas*, 123 U.S. 623, 668-669 (1887) as follows:

"A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not

disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests. . . . The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community."

In *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), this Court upheld as a safety measure a prohibition against the mining of sand and gravel below the water table. Recognizing that the ordinance would "completely prohibit[] a beneficial use to which the property" had been devoted, the Court nevertheless upheld it as "a valid exercise of the town's police powers. . . ." *Goldblatt, supra* at 592. Significantly the Court quoted *Mugler* at length.

To allow otherwise would be to put municipalities to an impossible choice. Should they subject their citizens to unreasonable risk of death or injury, or should they protect their citizens and compensate the owners of hazardous property? The consequences of the dilemma extend beyond the dangers posed by floods. Implicated as well are efforts to protect the public from toxic waste dumps, earthquake hazardous buildings (*see Barenfeld v. City of Los Angeles*, 162 Cal.App.3d 1035 (1984), wherein the court upheld as a reasonable safety measure a requirement that such

buildings be demolished or reinforced) and property subject to landslides.

CONCLUSION

For the reasons set forth above, the decision below should be affirmed.

Dated: November, 1986

Respectfully submitted,

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APPENDIX A

APPENDIX A

**CALIFORNIA CITIES JOINING
AS AMICI CURIAE**

Clovis

Poway

Hayward

Reedley

Hemet

San Diego

Lodi

San Francisco

Napa

San Jose

Novato

Santa Ana

Pacific Grove

Santa Barbara

Palm Springs

AMICUS CURIAE

BRIEF

(9)

No. 85-1199

Supreme Court, U.S.
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In The
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FIRST ENGLISH EVANGELICAL LUTHERAN
CHURCH OF GLENDALE, a California corporation,
Appellant,

v.

COUNTY OF LOS ANGELES, CALIFORNIA,
Appellee.

**ON APPEAL FROM THE COURT OF APPEAL OF
CALIFORNIA SECOND APPELLATE DISTRICT,
DIVISION SEVEN**

**Amici Curiae Brief of the States of California, Alaska,
Arkansas, Florida, Hawaii, Illinois, Maine, Massachusetts,
Minnesota, Mississippi, Missouri, New Hampshire,
New York, North Dakota, Oklahoma, South Carolina,
South Dakota, Texas, Utah, Vermont, Virginia,
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QUESTIONS PRESENTED

1. Where the state appellate court has remanded the case to the trial court for a trial on the issue of inverse condemnation and appropriate damages, does a final judgment exist for purposes of Supreme Court review?

2. Is the present takings claim ripe for review under the United States Constitution where the appellant did not seek a permit from the administrative body and, indeed, has not even sought a judicial determination that it has the right to build?

3. Has a local government, acting to comply with federal statutes and regulations, effected an unconstitutional taking of appellant's property by declining to permit construction in an area where recent floods have destroyed life and property, and reconstruction could endanger the lives and the property of others?

4. Where a regulation enacted in good faith to protect public safety and welfare conflicts with constitutionally-protected property rights, does the United States Constitution mandate the forced payment of "interim damages" in place of the equitable remedies traditionally available in such circumstances?

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INTEREST OF AMICI

Amici respectfully file this brief in support of appellee pursuant to rule 36.4 of the Rules of the Supreme Court of the United States.

The 24 states which have joined as amici in this case, together with their political subdivisions, exercise a broad array of regulatory powers within their respective jurisdictions. The issues presented by this case are of fundamental importance to California and each of the other governmental entities joining in this brief. A decision holding that the floodplain safety measures enforced by appellee herein have violated the United States Constitution would seriously impair the ability of these states and their political subdivisions to carry out their diverse police power responsibilities. Adoption of appellant's radical reformulation of takings jurisprudence would cripple amici's ability to perform regulatory functions upon which their citizens' health, safety and welfare quite literally depend.

STATEMENT OF THE CASE

Amici adopt appellee's statement of the case.

SUMMARY OF ARGUMENT

1. No final judgment for purposes of Supreme Court review exists in this case because there remain pending in the trial court proceedings which, if successful, will permit appellant to recover damages similar to those which it seeks from this Court.
2. This case is not ripe for Supreme Court consideration both because appellant has never sought a determination of what development might be allowed on its property and because it has failed to seek a determination of whether the regulation has effected a taking before pursuing the subordinate question of what remedies are available to cure any such taking.
3. There has been no taking of appellant's property. The ordinance at issue was adopted only after a flood had

totally destroyed the improvements on the property, killing 10 people just upstream. Construction on floodplains endangers both lives and property, and local government is not required by the Constitution to allow new construction exacerbating the proven risk. The federal government, recognizing the financial and physical risks of construction in flood-prone areas, imposes substantial penalties on communities which do not take actions to prevent inappropriately hazardous construction. The County would have been thwarting federal policy had it failed to restrict construction on appellant's property. Finally, even disregarding the especially hazardous nature of appellant's land, the complaint in this case simply fails to state the elements required under traditional takings analysis.

4. Consistent with precedent, a fully effective remedy in most cases where a "regulatory taking" exists is to remand the matter to the affected administrative or legislative body for corrective action under the continuing supervision of the trial court. Compelled payment of interim damages, on the other hand, would a) raise serious separation of power questions by forcing the judiciary to make de facto planning and budgetary decisions that have traditionally been left to other branches of government; b) carry the risk of financial chaos for state and local governments; and c) have a major chilling effect on the regulatory process. Recent decisions by this Court involving constitutional torts and 42 U.S.C. section 1983 further suggest that imposition of an interim damages remedy is inappropriate in the context of good faith regulatory conduct.

INTRODUCTION

For the fifth time this decade the Court is being asked to decide whether the United States Constitution mandates a damages remedy for overregulation of land use. In prior cases, the Court has failed to reach the damages question either because of procedural defects in plaintiff's case or because a violation of the Constitution had not been properly alleged or proven. Both of these barriers

are present in this case. Indeed, of the cases this Court has considered, the facts here are the furthest from a "taking" of property by government regulation.

I

BECAUSE NO FINAL JUDGMENT EXISTS IN THE CASE FOR THE PURPOSE OF SUPREME COURT REVIEW, THIS APPEAL IS NOT PROPERLY BEFORE THE COURT

Under 28 U.S.C. section 1257, review by this Court is only available in those cases resulting in a final judgment by the state court respecting the federal questions involved. The final judgment rule is founded upon the most sensitive considerations of policy and judicial administration. *North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156, 159 (1973). Appellant's representations notwithstanding¹, no final judgment exists in the present case.

Appellant joined its "regulatory taking" claim with a distinct inverse condemnation theory asserting that cloud-seeding activities undertaken by defendants had precipitated the flooding and resulting destruction of its property. J.A. 12-15. The California Court of Appeal found the latter theory to state a viable cause of action, and remanded it to the trial court for further proceedings, including ascertainment of appropriate damages. Jurisdictional Statement at A16-A18. Accordingly, this action has not been disposed of conclusively and the requisite finality is therefore lacking. See Stern, et al., *Supreme Court Practice* (1986) at 133, and cases cited therein.

Appellant cannot evade application of the final judgment rule by arguing that the regulatory taking claim it now advances is separable from or collateral to the cause of action previously remanded to the trial court. Assuming that appellant is able to prevail on its inverse condemnation claim in the trial court, it is entitled to damages under California law. *Holtz v. Superior Court*, 3 Cal.3d 296, 90 Cal.Rptr. 345, 475 P.2d 441 (1970). The amount

1. Jurisdictional Statement at 2n.1; Brief for Appellant at 3n.5.

of damages appellant seeks will presumably be based on the value of its campground property destroyed in the 1978 flood. This, of course, is precisely the type of damages appellant is seeking through the regulatory taking claim it advances before this Court.

Determination of whether a regulatory taking exists hinges in part on finding an excessive economic impact on the owner. See, e.g. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). Any award of damages under the remanded cause of action would lessen that economic impact. Thus while such an award would not be made as compensation for any claimed regulatory taking, it might well mitigate the overall diminution in value to the point where no regulatory taking could in any event fairly be found. Cf. *Penn Central*, *supra*, 438 U.S. 104, 137.

The Court's prior decisions dealing with state eminent domain proceedings provide ample guidance in this area. As explained in *North Dakota Pharmacy Board v. Snyder's Stores*, *supra*, 414 U.S. 156, 163, in such eminent domain cases "the federal constitutional question embraces not only a taking, but a taking on payment of just compensation . . . [A] state court judgment is not final unless it covers both aspects of that integral problem"; see also *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 633 (1981). Accordingly, no final judgment exists because the state court has not yet had an opportunity to complete its deliberations as to the amount of damages warranted in response to appellant's related "physical invasion" inverse condemnation claim.

II

THIS CASE IS NOT RIPE FOR REVIEW BY THIS COURT BECAUSE OF APPELLANT'S FAILURE TO SEEK A DETERMINATION AS TO THE PERMISSIBLE USES OF THE PROPERTY

A. Appellant Has Done Less to Determine to What Uses Its Property Might Be Put than Plaintiffs in Any Previous Related Case

This Court has made it abundantly clear that before it will reach the merits of a claim that the use of private

property has been unconstitutionally restricted, it must be satisfied that the plaintiff has obtained a final determination as to precisely what use or uses will be allowed. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. —, 105 S.Ct. 3108, 3117 (1985); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *MacDonald, Sommer & Frates v. County of Yolo*, — U.S. —, 106 S.Ct. 2561, 2568-69 (1986).

Appellant herein has done far less to determine what development might be allowed on its property than any of these other claimants. Prior to seeking judicial relief, appellant did not apply to the County of Los Angeles for a conditional use permit, a variance,² or any type of approval whatsoever. Indeed, appellant is here despite having done, quite literally, nothing at all to determine what development might be allowed. Appellant attempts to excuse this obvious failing by pointing to the bald allegation of the complaint that it has been deprived of *all* use. Yet this same allegation was also present (and rejected) in the prior cases. See, e.g., *MacDonald*, *supra*, 106 S.Ct. at 2563-64. As with each of those cases, the ordinance governing appellant's property allow numerous uses. (See *infra*.) Thus the conclusionary allegations of the complaint cannot stand when compared with the actual provisions of the ordinances governing appellant's property, of which the courts may take judicial notice under California law. California Code of Civil Procedure § 437 (West 1986).

B. The Courts Below Did Not Reach the Question of Whether a Taking Had Occurred in This Case; That Issue Is a Necessary Predicate to a Determination of the Damages Question by This Court.

2. Appellant attempts to excuse its failure to seek a variance because "use" variances are unavailable under California law. A "use" variance is one which allows, e.g., commercial uses in residential zones. Here the underlying zoning allows many "uses"; appellant complains only of a separate ordinance restricting the construction of buildings because of the flood hazard. If plaintiff could demonstrate that because of the circumstances of its particular property this prohibition was inappropriate, it could receive a variance to build buildings for any of the "uses" allowed by the underlying zoning.

This Court has made it clear that it will only reach the remedies question when properly presented with a takings claim. Indeed, just last term, now-Chief Justice Rehnquist, joined by Justice Powell, dissented from the majority's conclusion in *MacDonald* that the allegations of the complaint were insufficient to state a taking claim, but concluded that because of the difficulty of the damages question he "would not reach these questions without first permitting the courts below to address them in light of the fact that appellant has sufficiently alleged a taking." 106 S.Ct. at 2574.³ In this case, by requesting only damages without seeking a determination as to the validity of the regulation, appellant presented its claim in a way which effectively precluded the state courts from reaching the takings issue. Thus at *most* this Court could remand this case to the state courts for a determination of whether a taking had occurred. This is unnecessary, however, as it is quite clear that the County acted well within the limits of the Constitution.

III

APPELLANT'S PROPERTY HAS NOT BEEN TAKEN

A. Prohibition of New Construction on Property Which Has Twice Been Subject to Flooding in the Past Twenty Years Does Not Constitute a Taking of Property

The complaint herein tells a dramatic story. It begins with a description of a 1978 flood which caused the "loss of Lutherglen," the property at issue, destroying the buildings and landscaping constituting the camp. (J.A. 8-11.) Appellant was lucky to lose nothing more, for just upstream this same flood killed ten people. R.T. 10, 422. While this flood may have been more extreme than normal due to a fire the year before, it was not totally unexpected either; a study attached to the complaint (but not included in the Joint Appendix) describes a 1969 flood which also damaged the camp. C.T. 343-46. Following the second flood in ten years, the county enacted the

3. The majority in *MacDonald* similarly took the view that the issue of whether a taking exists necessarily precedes resolution of the remedies question. 106 S.Ct. at 2568-69; see also *San Diego Gas & Electric Co.*, *supra*, 450 U.S. 621, 633.

ordinance at issue here restricting future construction in the area. Given the history of the site and the obvious need to protect the lives and property of those in the vicinity and downstream, the county's action was hardly precipitate. Appellant itself may recognize the danger of rebuilding on this site; it has not asked the county, the courts below, or this Court for the "right" to build on this ill-fated site again. Remarkably, however, appellant seeks a ruling from this Court that it has a constitutional right to compensation from the taxpayers for the value of its property simply because the County does not want to allow another catastrophe to occur on the site. Appellant has surely had losses, but they have been caused by nature, not government.

This Court has long recognized that property is not "taken for public use" in the constitutional sense when governmental bodies are merely fulfilling their historic and crucial responsibility to prevent people, by the use to which they put their property or otherwise, from harming their neighbors. Examples abound, beginning at least with *Mugler v. Kansas*, 123 U.S. 623 (1887), upholding against constitutional challenge the state's power to close a profitable brewery. In *Miller v. Schoene*, 276 U.S. 272 (1928), the Court upheld the destruction of a large number of red cedar trees, which had been required by the state because of a threat of communication of a serious disease to the nearby apple orchards. Similarly, in *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), the Court upheld a prohibition on gravel mining below the town's water table even though the ordinance destroyed a long-existing business.⁴ Landowners cannot be left free to charge the public for forgoing harmful activities. See, e.g., *Erie Railroad Company v. Public Utilities Commission*, 254 U.S. 394, 410-11 (1921) ("If it reasonably can be said that safety requires the change . . . neither prospective bankruptcy nor engagement in interstate com-

4. These principles are developed in far greater detail in the amici curiae brief filed with the Court by the States of California, et al., in *Keystone Bituminous Coal Ass'n v. Duncan*, Docket No. 85-1092, currently pending before the Court.

merce can take away this fundamental right of the sovereign of the soil."); *Penn Central Transportation Co.*, *supra*, 438 U.S. 124, 145 ("The question is whether the forbidden use is dangerous to the safety, health, or welfare of others"). (Rhenquist, J., dissenting).

The ordinance at issue here falls squarely within this venerable line of authority. Building in floodplains endangers not only those living or working on the property in question but also those who will be called upon to rescue them when the predictable disasters occur. Construction in floodplains also endangers people and property downstream. Thus, man-made obstructions in floodplains are not simply risky investments for their builders; they impose risks on the rest of society which may prove far higher than their risks to their owners. Surely government has the power to regulate to prevent such hazards, particularly when (as here) there is conclusive evidence of the necessity for such action.⁵

B. The Federal Floodplain Management Program, Pursuant to Which the Ordinance at Issue Here Was Adopted, Demonstrates the Importance of Floodplain Controls to the Nation as a Whole as Well as to Individual Communities

The ordinance at issue here was not adopted on some whim of the County of Los Angeles but pursuant to a federal program requiring local governments to restrict development in flood-prone areas in order to remain eligible

5. Appellant argues in this Court that its property has been taken for use as part of a public flood control channel. E.g., Brief for Appellant at 47. Had such a taking occurred, appellant would be entitled to monetary compensation under California law. See *Baker v. Burbank-Glendale-Pasadena Airport Authority*, 39 Cal.3d 862, 218 Cal.Rptr. 293, 705 P.2d 866 (1985). In fact, however, as the trial which took place below demonstrated, appellant's property is subject to flooding not because of actions of the County of Los Angeles but because of natural conditions. Jurisdictional Statement at A9-A10. That determination is not before the Court. Appellant's property is subject to flooding, but that does not make it part of a "public flood control channel," and the County is not required to pay damages because of the unfortunate location of appellant's property.

for federal assistance. Had the County not acted to prevent future damage in the area, it would have run afoul of federal directives and damaged or destroyed the ability of its citizens to obtain federal relief from future catastrophies.

Federal concern with the increasing costs of flooding due to inappropriate development can be traced at least to 1966 with publication of the report *Task Force on Federal Flood Control Policy, & Unified National Program for Managing Flood Losses*, H.R. Doc. 465, 89th Cong., 2d Sess. Two years later, Congress addressed the problem by enacting the National Flood Insurance Act of 1968, which created a national, federally subsidized, flood insurance program. 42 U.S.C. 4001 et seq. In 1973, the program was strengthened by requiring the purchase of flood insurance as a prerequisite to federal financial assistance with purchase or construction costs. See P.L. 93-204.

In addition to encouraging private landowners to participate in the program, thereby spreading the risks which would otherwise result in claims for federal disaster relief, the law also urges local governments to adopt local floodplain management measures to prevent or reduce the risks posed by flooding. Localities which do not act to restrict or prohibit development in accordance with federal regulations impose serious burdens on their citizens, including the loss of eligibility for any federal assistance to properties in flood-prone areas. 42 U.S.C. 4106(a). This includes the loss of not only direct federal grants but such things as FHA and VA mortgages. Congress intended this legislation to have profound influences on local land use decisions. See Senate Report No. 93-583, reprinted in 1973 *U.S. Code Cong. & Adm. News* at 3217. As a result of these substantial incentives (and disincentives), some 16,000 communities participate in the program. Holmes, "Federal Participation in Land Use Decision Making at the Water's Edge—Floodplains and Wetlands," 13 *Natural Resources Lawyer* 351, 364 (1980).

Had the County of Los Angeles chosen to ignore the dangers inherent in building again on this site, it would thus have exposed its citizens not only to the physical danger which construction obviously poses, but to the financial risk of losing much of the federal assistance otherwise available to them to develop or protect their own properties. Nothing in the Constitution required the County to make such an irrational choice.

C. Even Under Traditional "Takings" Analysis, Disregarding the Hazardous Character of Appellant's Property, a Taking Claim Has Not Been Stated

In its complaint, appellant says merely that the flood control ordinance "denies [it] all use of Lutherglen."⁶ Even on its face however, the ordinance in question only prohibits construction of buildings within a defined flood protection zone. The complaint does not explain or even allege why uses not requiring construction would not constitute "use" of the property, or why such uses would not be reasonable given the character of the parcel. A review of the county ordinances involved herein shows that many uses are allowed on appellant's land as of right. Even more are available with special use permits, many of which do not require the construction of buildings, for example: archery ranges, athletic fields, campgrounds, golf course, riding and hiking trails, riding academies and stables, breeding farms for horses or cattle, and the grazing of livestock. Los Angeles County Planning and Zoning Code, § 22.40.190. The complaint gives no hint as to why the Court should consider each and every one of these uses, and each of the many of others available in these zones, equivalent to "no use." The complaint does not even allege that any of these specific uses are uneconomical. In past cases, this Court was unwilling to indulge unsupported assertions about what uses of property

6. The use of the name "Lutherglen," without more, is a source of confusion. It is not clear, for example, whether the complaint is actually alleging that appellant's entire property now has no available uses—an allegation which is contrary to the face of the county ordinances—or merely that appellant cannot use (or rebuild in *toto*) the facilities destroyed by the flood.

were and were not available or economical. See, e.g., *MacDonald, supra*, 106 S.Ct. at 2564. It should not do so here.

Appellant's complaint fails to satisfy the requirements of a proper takings claim in many other ways. For example, one element of a takings claim concerns the reasonable investment-backed expectations of the owner. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). While buildings existed on the parcel prior to the flood, could appellant reasonably believe that it would be allowed to rebuild if its improvements were destroyed by repeated natural disasters? Had the improvements been fully amortized over the period in which they were in place? For that matter, what investment did appellant have in the property? The complaint is completely silent on these questions, which form essential components of the *Penn Central* takings equation.

IV

IF A REGULATORY MEASURE IS FOUND TO CONSTITUTE A "TAKING" OF PROPERTY AS APPLIED TO A PARTICULAR PROPERTY OWNER, EQUITABLE RELIEF IS AN ESTABLISHED AND ADEQUATE REMEDY UNDER THE UNITED STATES CONSTITUTION

Even if an unlawful taking was found to exist in this case, established precedent and public policy indicate that compelled payment for a retroactive property interest, i.e., "interim damages," is an inappropriate remedy.

A. The Debate Over The Compensation Issue Has Been Overstated; The Relatively Narrow Question Involved Is Whether "Interim Damages" Are Constitutionally Required To Cure A "Regulatory Taking."

The remedies issue presented by this case has been a subject of confusion and overstatement. In fact, as Justice Stevens observed in his concurring opinion in *Williamson County, supra*, 473 U.S. at —, 105 S.Ct. 3108, 3125-3126 (1985), relatively little separates the view articulated

by dissenting Justice Brennan in *San Diego Gas & Electric v. City of San Diego*, 450 U.S. 621, 636-661 (1981) and those set forth in *Agins v. City of Tiburon*, 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25, affirmed on other grounds, 447 U.S. 255 (1980). There is no dispute, for example, that land use restrictions found constitutionally excessive under the standard enunciated in *Penn Central* and its progeny cannot be enforced as a permanent restriction on private property without payment of just compensation. See *Williamson County, supra*, 105 S.Ct. at 3125 (Stevens, J., concurring). This has long been recognized by the California Supreme Court as well. *Furey v. City of Sacramento*, 24 Cal.3d 862, 874, 157 Cal. Rptr. 684, 691, 598 P.2d 844, 851, cert. den. 444 U.S. 976 (1979). Nor do we understand appellant and its amici to disagree with the rule applied in state and federal courts alike that "there is nothing in the Constitution that prevents the government from electing to abandon the permanent-harm-causing regulation" and thus eliminate the taking. *Williamson County, supra*, 105 S.Ct. at 3125 (Stevens, J., concurring); see also, *San Diego Gas & Electric, supra*, 450 U.S. at 657 (Brennan, J., dissenting). Thus, if a particular regulation is found to be excessive under the Constitution, the government which enacted it must either compensate the landowner or cease applying the offending regulation. To this point, the law is settled and there can be no reasonable dispute.

What is at issue here (and has been at the heart of the remedies debate since *Agins*) is whether and under what circumstances the government is required to pay damages prior to a court ruling on the constitutionality of a restriction. It is to this issue — the availability of "interim damages" as a remedy for regulatory takings — that amici now turn their attention.

B. The Court's Prior Decisions Simply Do Not Support The Assertion That A Monetary Remedy Is Compelled For A Regulatory Action Which Constitutes A "Taking."

The debate over whether interim damages are a proper remedy to cure "regulatory takings" is unsettled and will ultimately require guidance from this Court.⁷ Yet, as it considers the issue, the Court should reflect that mandating a damages remedy for regulatory takings" would constitute a marked departure from its past precedents.⁸

The theory that a regulatory measure might result in a constitutionally compelled award of damages is of recent origin.⁹ Several property law experts, in a comprehensive historical analysis of the Taking Clause, conclude that the clause was never intended to apply to such regulations at all but, instead, to physical seizures of property by the sovereign. Bosselman, Callies and Banta, *The Taking Issue* (1973) 104, 319. As a group of legal

7. In *Agins, San Diego Gas & Electric, Williamson County, MacDonald*, and again here, the parties and assorted amici have marshalled a stupefying list of reported cases and law review articles that explore this and related issues in excruciating detail. No useful purpose would be served by repeating that exercise here. Suffice it to say that there is a split of opinion within both federal and state court systems, with a corresponding cacophony of debate in academic circles. Cf. *Williams, et al., The White River Junction Manifesto*, 9 Vt.L.R. 193 (1984) (hereinafter "White River") and Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable In Land Use Controls*, 15 Rutgers L.J. 15 (1983), two articles which are representative and ably set forth the competing positions.

8. Remarkably, appellant suggests that this Court has already effectively resolved the question of whether damages are required to cure a regulatory taking, yet simultaneously argues that the court needs to resolve the question. Amici share the latter position, but believe the former to be both inconsistent and erroneous.

9. See, e.g., Hagman and Mischynski, *Windfalls for Wipe-outs: Land Value Capture and Compensation* (1978) 256, 272:

"During the first part of this century, courts had called harsh regulations takings, and, since no compensation had been offered, the courts invalidated them. It hardly occurred to anyone that if the regulation was a taking, then a possible remedy was for the property owner to sue in inverse condemnation. . . . 'Until the 1970s, no reported case recognizing inverse condemnation for mere regulation could have been cited.'"

scholars noted recently: "Nothing in the Constitution provides any basis for a new constitutional rule that now, after 200 years of consistent constitutional jurisprudence during which the recognized remedy for unconstitutional regulation was invalidation, the balance has tilted away from deference to legislative discretion to a judicial theory of strict liability." (*White River* at 210-211n.57.¹⁰)

As the Court observed in *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 166n.12 (1958), "Ordinarily, the remedy for arbitrary governmental action is an injunction, rather than an action for just compensation." See also, *Pamel Corp. v. Puerto Rico Highway Authority*, 621 F.2d 33, 35 (1st Cir. 1980).

Appellant mistakenly relies upon past cases in which the federal courts have mandated compensation in the face of actual governmental seizure of private property. Such precedents simply reflect the rule that the United States and individual states may constitutionally enter into physical possession of property without first filing condemnation proceedings, and instead require the owner to him or herself institute proceedings for compensation. *United States v. Dow*, 357 U.S. 17, 21 (1958). A corollary principle is that physical invasions of private property rights may trigger a requirement for compensation. *United States v. Lynah*, 188 U.S. 445 (1903) (flooding of plaintiff's land); *United States v. Causby*, 328 U.S. 256 (1946) (airplane overflights). The nature of such takings

10. Even those who seemingly concur in the views expressed in the dissent of Justice Brennan in *San Diego Gas & Electric*, *supra*, 450 U.S. at 636-661, acknowledge that the concept of a compelled damages remedy represents a departure from established law. See, e.g., Cunningham, *Inverse Condemnation as a Remedy for "Regulatory Takings,"* 8 Hastings Const. L.Q. 517, 538 (1981): "The traditional recourse of landowners and land developers whose plans for profitable development of land are blocked by restrictive zoning or other land use regulations is a suit to invalidate the regulations on constitutional grounds"; see also, Note, *Just Compensation or Just Invalidity: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 U.C.L.A. L.R. 711, 715 (1982); Blume and Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 Cal. L.R. 569, 623 (1964).

accounts for the Court's historical reluctance to utilize injunctive relief when to do so might frustrate legitimate government functions. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The Court has thus at times required compensation rather than an injunction *because it perceived Congress to prefer damages to invalidation of the statute*, not because a property owner demanded it. See, e.g., *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974).

Contrary considerations obtain in the case of alleged takings resulting solely from application of the government's police powers, i.e., "regulatory takings." Such acts are neither permanent nor irreversible. This Court has previously recognized that the distinction between "physical invasion" and "regulatory" takings is one of a kind rather than degree. See *Loretto*, *supra*, 458 U.S. at 426-427, 432, 435; *United States v. Clarke*, 445 U.S. 253, 257-258 (1980). This critical difference accounts for the traditional use of equitable remedies in the case of "regulatory takings" and damages in "physical invasion" cases.

Creation of an interim damages remedy for regulatory takings would work a radical departure in takings jurisprudence and economic regulation generally. The parameters of the rule suggested by appellant are far from clear. For example, drug manufacturers are commonly required to withhold public sale of drugs, often for several years, pending safety testing and certification by the federal Food and Drug Administration. State public utility commissions regularly withhold approval of utility rate increases pending completion of detailed economic analyses and public hearings. Such regulatory delays can at times deprive utilities, corporations and individual owners of various types of property interests of millions of dollars. This is true even in cases where government review ultimately proves the product safe, the rate increase fully justified, etc. Yet until now it has never been seriously suggested that such state or federal regulators are liable for interim losses suffered as a direct

result of governmental delay in issuing permits, granting rate increases, etc. under a theory of inverse condemnation. Such a rule simply makes no sense. See, *Suess Builders Co. v. Beaverton*, 294 Or. 254, 656 P.2d 306, 309 (1982):

“... the balancing of regulatory goals against their economic consequences is the daily stuff of politics rather than of litigation for ‘just compensation.’”

Nor has appellant made any showing that land has been or should be treated any differently from other types of property interests under the Takings Clause. Neither precedent nor common sense support the idea that interim damages should be available for overregulation of land to the exclusion of other forms of property. Indeed, past decisions of this Court analyze all forms of private property similarly situated under the Takings Clause. See, e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). To impose an interim damages remedy upon land use agencies for good-faith, regulatory actions in the present context would saddle them with a major burden neither warranted nor afforded the private sector in other fields of economic regulation. *Suess Builders Co. v. Beaverton*, *supra*, 294 Or. 254, 656 P.2d at 309. There exists no law or policy-based reason to carve out a special exception for land use measures of the type at issue here.

C. Remanding A Regulatory Measure Which Constitutes A Taking Of Property Is Generally An Effective And Appropriate Remedy.

The appropriate remedy following a finding of a “regulatory taking” is to remand the case to permit the agency or legislative body with directions to make an informed decision as to whether to repeal the offending measure, acquire the parcel or take other sufficient corrective action. Absent unusual circumstances discussed *infra*, interim damages should not be assessed against government for its good-faith, albeit erroneous, exercise of the police power.

This rule respects longstanding precedent while avoiding the imposition of forced purchase of at least a temporary (i.e., retroactive) property interest on an agency that often lacks the requisite power, funds or desire to do so. The Court should instead afford government a reasonable opportunity to cure the taking. In particular cases, purchase may ultimately be the optimum solution; in others, rescission or modification of the offending measure is appropriate. A blanket rule imposing interim damages as a compelled remedy, however, would be inflexible and ultimately counterproductive. See part IV D, *infra*.¹¹

Illustrative of the proper approach is the California Supreme Court’s decision in *Furey v. City of Sacramento*, *supra*, 24 Cal.3d 862, 157 Cal.Rptr. 684, 598 P.2d 844. In *Furey*, the court held that allegations that a city encouraged installation of public improvements with private funds, if proven, could constitute a taking where subsequent municipal zoning rendered those improvements worthless. 24 Cal.3d at 874, 157 Cal.Rptr. at 690-691, 598 P.2d at 851. The court, however, rejected an award of damages premised on a theory of inverse condemnation. It instead found it appropriate to remand the proceedings to the local governmental entities to afford them “a reasonable opportunity to make use of the reassessment procedures . . . or to take other appropriate action di-

11. Appellant asserts that a total of eleven states have concluded “on their own,” i.e., for reasons other than a belief as to what this Court will ultimately decide, that damages are required for regulatory takings. Brief for Appellant at 9. To say the cases cited by appellant for this proposition are not always on point is to be extremely charitable. Most involve inequitable precondemnation activity, something for which damages are clearly available under California law, *Klopping v. City of Whittier*, 8 Cal.3d 39, 104 Cal.Rptr. 1, 500 P.2d 1345 (1972). See, e.g., *Clifton v. Berry*, 244 Ga. 78, 259 S.E.2d 35 (1979); *Suess Builders Co. v. City of Beaverton*, 294 Or. 254, 656 P.2d 306 (1982). Remarkably, in one of these cases plaintiff’s property had been paved as part of a public street, hardly a “regulatory” taking, *Brazil v. City of Auburn*, 23 Wash. App. 672, 598 P.2d 1 (1979). Not one of the eleven cases cited by appellant clearly rejects the California rule. Appellant’s implicit assertion that states are flocking to its side is wholly fanciful.

rected toward ameliorating in equitable fashion the gross inequities which here appear." 24 Cal.3d at 878, 157 Cal.Rptr. at 693, 598 P.2d at 853; see also, *Ed Zaagman, Inc. v. City of Kentwood*, 406 Mich. 137, 277 N.W.2d 475, 480-489 (1979) (requiring remand for administrative corrective action following judicial finding of a taking); *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980); cf. *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1200-1201 (5th Cir. 1981), cert. den. 455 U.S. 907 (1982).¹²

Appellant and its supporters raise several points in opposition to the established remedy of invalidation. First, they contend that the remedy is simply not invoked (at least in California) in response to legitimate challenges to regulatory measures. An objective review of the cases, however, reveals this argument to be utterly without merit.¹³ Similarly, California statutes facilitate in a number of important ways the prompt and fair resolution of judicial challenges to invalidate government regulations.¹⁴

Appellant suggests that even if state courts are prepared to invalidate regulatory measures in appropriate cases, the remedy is ineffective because local planning entities would prove intransigent and frustrate meaningful relief. This argument is defective on several levels.

First, it ignores the unquestionable power of a trial court to retain continuing jurisdiction over a case fol-

12. Various existing or proposed statutes further refine the procedures governing this process. See, e.g., the Delaware Wetlands Law (7 Delaware Code, ch. 66); Mass. Gen. Laws C. 131, § 40A and C. 130, § 105; ALI Model Land Development Code, 9-112(3).

13. For a partial listing of cases demonstrating California's willingness to invalidate overly restrictive regulatory measures, see Brief of Amici Curiae State of California, et al., filed with the Court in *MacDonald, Sommer & Frates v. County of Yolo*, Docket No. 84-2015 at 19-21n.26.

14. See, e.g., Cal. Code Civ. Proc., § 66499.37 (West 1986) (granting preference on the trial calendar to such cases); Cal.

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lowing its finding that a particular measure is constitutionally excessive. The judge, having initially found a "taking," exercises inherent and traditional supervisory power to oversee the administrative decision-making process on remand. This includes the ultimate power to mandate specific administrative actions in appropriate cases.¹⁵

More fundamentally, this argument denigrates the honesty and integrity of government decision-makers in general. Public officials, sworn to uphold constitutional rights to the best of their ability, are not likely knowingly and voluntarily to violate that oath. Nor will they lightly risk contempt of court sanctions for attempting to subvert judicial decrees.

Similarly overlooked is the fact that litigation per se—even without the spectre of an interim damages remedy—provides a powerful disincentive against improper governmental conduct. The prospect of expensive and time-consuming litigation, together with the assessment of substantial costs and attorney's fees in cases governments lose, is likely to deter precisely the type of conduct that proponents of a damages remedy find so repugnant.

There are additional reasons why interim damages should be rejected in favor of equitable relief. This Court has consistently held that a property owner may incur temporary economic harm without finding redress under the Fifth Amendment. *Danforth v. United States*, 308

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Code Civ. Proc., § 1036 (West 1986) (awarding attorney's fees and related expenses to successful plaintiffs in "inverse condemnation" actions); Cal. Evid. Code, § 669.5 (West 1986) (shifting to the governmental agency the burden of proof in justifying local growth control measures against judicial attack), upheld and applied by the California Supreme Court in *Building Industry Assn. v. City of Camarillo*, 41 Cal.3d 810, 226 Cal.Rptr. 81, 718 P.2d 68 (1986); and Cal. Gov. Code, § 65589.6 (West 1985) (similar shift in burden of proof regarding challenge to local government decisions rejecting housing projects or reduce their density).

15. See *Southern Burlington County NAACP v. Township of Mt. Laurel*, 92 N.J. 158, 456 A.2d 390, 490-491 (1983); *Furey v. City of Sacramento*, supra, 24 Cal.3d 862, 157 Cal.Rptr. 684, 598 P.2d 844.

U.S. 271 (1939). Temporary delay in securing economic benefits attributable to one's property interests generally is "a by-product of governmental decision-making . . . an inevitable cost of doing business in a highly regulated society." *Williamson County, supra*, 105 U.S. at 3126 (Stevens, J., concurring); *Andrus v. Allard*, 444 U.S. 51, 67 (1979). As Justice Powell observed for a unanimous Court in *Agins v. City of Tiburon, supra*, 447 U.S. at 263, n. 9:

"Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.'"¹⁶

16. See also 2 J. Sackman & P. Rohan, *Nichols' Law of Eminent Domain* § 6.13[3] (3d ed. 1979). While appellant seeks to rely upon Nichols, that work observes that landowners have sought to expand the availability of inverse condemnation damages into new areas such as "air pollution cases and, most surprisingly zoning cases." *Id.* at § 6.21 at 6-137. Emphasis added.

Referring to the metaphor adopted by the Court in *Andrus v. Allard, supra*, 444 U.S. at 65-66, government's temporary interference with land use at most destroys one part of one strand of a landowner's property rights. "The mere inconvenience of a temporary interference in the use of land, while a court tests the validity of a police power regulation, . . . can hardly be said to be a 'taking' when viewed in the aggregate." *White River* at 217; cf. *Penn Central, supra*, 438 U.S. at 130-131.

Moreover, such short-term losses are far less substantial than those traditionally found noncompensable under the venerable rule that a mere diminution in the value of property is not a constitutional taking. See, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (87.5% reduction in value) and *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926) (75% reduction in value).

This principle is analogous to the numerous federal and state court decisions which have upheld the power of agencies unilaterally to impose good faith, fixed-term moratoria on land use development. *Donohue Construction Co., Inc. v. Montgomery Co.*, 567 F.2d 603, 608 (4th Cir. 1977); *Miller v. Board of Public Works*, 195 Cal. 477, 234 P. 381 (1925), cert. den. 273 U.S. 781 (1927).

Left to be considered is the rare case where malicious or wanton conduct is at work. E.g., *San Diego Gas & Electric Co., supra*, 450 U.S. at 644n.22 (Brennan, J., dissenting). Such conduct cannot be condoned and may well warrant an award of damages. Yet this Court has had little difficulty fashioning precise rules to correct intentional constitutional torts in a variety of contexts. See, e.g., *New York Times v. Sullivan*, 376 U.S. 254 (1964); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269-270 (1981); *Harlow v. Fitzgerald*, 457 U.S. 800, 817-819 (1982). There is no reason to believe that it is any less able to articulate such effective and precise sanctions in the case of regulatory officials who knowingly abuse their important offices.

Similarly, cases involving unreasonable delay or improper precondemnation conduct by an agency also warrant a remedy in damages—as exists under California law. *Klopping v. City of Whittier*, 8 Cal.3d 39, 104 Cal. Rptr. 1, 500 P.2d 1345 (1972); cf. *Drakes Bay Land Co. v. United States*, 459 F.2d 504 (Ct. Cl. 1972).

The essential flaw in the interim damages remedy urged by appellant is that it "would punish the well-intentional local legislature as well as the odious one." *White River* at 243. This Court has previously alluded to the need to focus upon bad faith conduct in passing upon regulatory measures.¹⁷

In the vast majority of cases, however, it is indisputable that federal, state, regional and local officials act in good faith. Inadvertent regulatory excess under such circumstances can be corrected fully by remanding the matter to the administrative/legislative body for corrective action.¹⁸

17. See, e.g., *Agins v. City of Tiburon, supra*, 447 U.S. at 260, 263n.9; *Harlow v. Fitzgerald, supra*, 457 U.S. at 815-819.

18. Speaking to the damages issue, Justice Brennan has inquired: "If a policeman must know the Constitution, then why
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D. Compelled Payment of Interim Damages To Remedy A "Regulatory Taking" Contravenes Several Important Public Policies.

Numerous important considerations of public policy underlie the longstanding rule that judicially imposed "interim damages" are inappropriate in a case involving a "regulatory taking." Several of the most important are summarized below.

1. Required Payment Of Compensation In The Form Of Interim Damages To Correct A Regulatory "Taking" Would Effectively Transfer The Power Of Eminent Domain From State And Local Legislators To The Judiciary, And Is Therefore Inconsistent With The Separation of Powers Doctrine.

Appellant's theory of "temporary takings" would, if accepted, transfer a significant portion of the power of the purse from local and state legislatures to the judiciary, with concomitant damage to legislative independence. The judiciary must make the often difficult determination of whether a particular regulatory action is sufficiently oppressive that it violates a landowner's constitutional rights. That decision can involve close questions and subtle distinctions, but constitutes the acceptable price

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not a planner?" *San Diego Gas & Electric, supra*, 450 U.S. at 661 n.26. The answer, of course, must be in the affirmative. The more specific and difficult issue in this case, however, is the appropriate remedy to cure a "taking." Returning to Justice Brennan's policeman analogy, the remedy devised by the Court and commonly applied to address illegal searches and seizures by law enforcement officials is to invoke the exclusionary rule, i.e., to "invalidate" the evidence or arrest. *Mapp v. Ohio*, 367 U.S. 643 (1961); cf. *United States v. Leon*, 468 U.S. 897 (1984) (ruling exclusionary rule inapplicable in cases of objectively reasonable law enforcement activity). It is only in the relatively rare case of wanton or malicious police conduct that damages have been deemed an appropriate remedy assessed against those involved. *Monroe v. Pape*, 365 U.S. 167 (1961), overruled on other grounds, *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1977). Precisely the same principle should apply in the regulatory context.

always associated with judicial line-drawing in a complex policy area. However, under appellant's argument, the price of stepping over the line, however slightly and however innocently, would effectively force purchase of a retroactive property interest, unbudgeted and unplanned, virtually impossible to anticipate.

The power to regulate and the power of eminent domain are two distinct powers of government. See, e.g., *Fred F. French Invest. Co. v. City of New York*, 39 N.Y.2d 58, 385 N.Y.S.2d 5, 8-9, 350 N.E.2d 381, 384 (1976), app. dism. 429 U.S. 990 (1977). The fact that the former may be limited by the same constitutional clause which limits the latter does not mean that the latter has been exercised when that limit is reached. Where the legislature has not chosen to exercise its eminent domain power, the courts should not compel its use as a damage remedy. This result simply recognizes the proper constitutional role of the legislative branch of government in determining when that legislative power should be exercised.

Sensitivity to the separation of powers concern is abundantly reflected in recent takings jurisprudence. See, e.g., *NBH Land Co. v. United States*, 576 F.2d 317, 319 (Ct. Cl. 1978); *Jacobson v. Tahoe Regional Planning Agency*, 474 F.Supp. 901, 904 (D. Nev. 1979), aff'd on other grds., 661 F.2d 940 (9th Cir. 1981); *Agins v. City of Tiburon, supra*, 24 Cal.3d at 276, 157 Cal. Rptr. at 377, 598 P.2d at 30 (1979); cf. *National Wildlife Federation v. United States*, 626 F.2d 917 (D.C. Cir. 1980).

2. Adoption Of A Compelled Interim Damages Rule In Land Use Cases Would Result In Major Additional Fiscal Problems For State and Local Governments.

Closely related to the separation of powers concerns is the fact that the rule urged by appellant could undermine the fiscal well-being of state and local governments.

Judicially compelled damages in this context could have major adverse fiscal consequences. With the advent of severe tax reduction measures across the nation (such

as California's Proposition 13 [Cal. Const., art. XIII A], adopted by voter initiative in 1978), state and local governments are being asked to meet increasing demands with a stable or even declining revenue base.¹⁹

At a time when the federal government looks to state and local jurisdictions to provide an increasing proportion of necessary public services (e.g., Balanced Budget and Emergency Deficit Control Act of 1985 [Gramm-Rudman-Hollings Act], P.L. 99-177), it would be singularly inappropriate to add to that financial burden through the creation of a novel damages remedy for "temporary takings."

Appellant suggests that such financial considerations should ultimately be irrelevant to the determination of whether interim damages are an appropriate remedy in this case. Yet this Court has regularly taken cognizance of fiscal considerations in fashioning appropriate remedies to cure constitutional violations. E.g., *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981) (punitive damages generally not allowed against municipalities in § 1983 actions); *Harlow v. Fitzgerald*, 457 U.S. 800, 816-819 (1982).

Finally, courts have recognized the adverse federalism-related consequences of imposing upon the federal judiciary the de facto task of allocating state and local funds.²⁰

19. As one scholarly analysis observes:

"The most important current fact about local government is that its revenue base is wholly inadequate. The traditional system of financing major public services through local real property taxation, and in some states local sales and excise taxes has visibly been breaking down all around us. The system simply does not produce enough revenue to provide for what are even now regarded as the normal functions of local government. In this situation, local officials are inevitably and necessarily preoccupied with the problem of finding more sources of revenue, and trying to keep down demands for additional services." *White River* at 207.

20. "Federal enforcement of the inverse condemnation remedy would be a singularly inappropriate intrusion into the

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3. The Required Payment of Interim Damages In Land Use Cases Will Have A Chilling Effect On The Exercise Of Necessary Regulatory Functions, Particularly Given The Nebulous Nature Of Takings Jurisprudence.

The award of damages against government entities predicated on a "temporary taking" theory is likely to have a major chilling effect upon essential governmental functions. Given the limited budgets of most such bodies, only the bravest official will venture more than the mildest, and most ineffectual, form of regulatory controls.²¹

This Court has repeatedly expressed the same concern. E.g., *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 405 (1979); *Harlow v. Fitzgerald*, *supra*, 457 U.S. at 814, 717 n.29 (1982).²²

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states' traditional domains of property law and land use policy." *Pamel Corp. v. Puerto Rico Highway Authority*, *supra*, 621 F.2d at 36; cf. *Agins v. City of Tiburon*, *supra*, 24 Cal.3d at 276, 157 Cal. Rptr. at 377-378, 598 P.2d at 29-30.

21. See Wright, *Exclusionary Land Use Controls and the Taking Issue*, 8 Hastings Const. L.Q. 545, 583 (1981); see also, *White River* at 240; Hall, *Eldridge v. City of Palo Alto: Aberration of New Directions in Land Use Law?*, 28 Hastings L.J. 1569, 1597 (1977); *Weather*, *Some Tentative Notes on the Integration of Police Power and Eminent Domain by the Courts: So-Called Inverse or Reverse Condemnation*, Urb. L. Ann. 1-2 (1968).

22. Appellant dismisses as mere speculation the deleterious effect an interim damages sanction would have on the regulatory process. Yet illustrations are numerous. One study noted in a recent law review article involving zoning regulations modeled on those reviewed by this Court in *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (upholding municipal closure of sand and gravel mine). When nearly 300 county planning associations were asked if they would attempt to close the quarry based on the regulations if a successful suit by a landowner would result in a damages award as well as invalidation of the regulation, only eight percent of the members polled said they would do so. Sallet, *The Problem of Municipal Liability for Zoning and Land-Use Regulation*, 31 Cath. L.R. 465, 478 (1982).

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If governmental entities may exercise their regulatory powers only at the risk that they may have inadvertently "purchased" temporary interests in regulated property, appropriate and necessary regulation will be substantially inhibited, with a predictable adverse effect on the nation's social and natural environment. *Charles v. Diamond*, 41 N.Y.2d 318, 392 N.Y.S.2d 594, 604-605, 360 N.E.2d 1295, 1305 (1977); *Allen v. City and County of Honolulu*, 471 P.2d 328, 331 (Haw. 1977).

This Court has consistently emphasized that a damages remedy should not be available where it would have such a chilling effect:

"Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subject to the cost and inconvenience and distraction of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951); cf. *Harlow v. Fitzgerald*, *supra*, 457 U.S. at 814.

Further, imposition of a mandatory damages remedy in regulatory takings cases could discourage state and

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Opportunities for harassment of local officials through an interim damages remedy are considerable. One well-publicized recent case in California involved an attorney's efforts to operate his law office in an area zoned for residential use over the objection of neighboring homeowners. In response to the county's commencement of a zoning enforcement action, the attorney sued, *inter alia*, to invalidate the measure and seek damages under 42 U.S.C. section 1983 from the county and an individual county supervisor whose principal involvement apparently was to have met with some of the affected neighbors. The jury returned a verdict of \$650,962 each in damages against the county and the individual supervisor. The verdict was ultimately reversed on appeal following expensive and protracted legal proceedings. *County of Butte v. Bach*, 172 Cal.App.3d 848, 218 Cal.Rptr. 613 (1985).

local governments from participating in a wide variety of federal programs that depend for their effectiveness on state and local implementation. See, e.g., Coastal Zone Management Act of 1972, 16 U.S.C. § 1451 et seq.; cf. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq., 1344(g) (delegation to state of § 404 dredge-and-fill program). See also discussion at 8-10, *supra*.

The disincentive represented by a damages remedy is reinforced by the nebulous nature of underlying takings jurisprudence. This Court has repeatedly professed itself unable to fashion any general standards to determine when regulation exceeds the limits of the Fifth Amendment. Rather, it has indicated that the inquiry necessarily involves an ad hoc application of general standards to particularized facts. *Penn Central*, *supra*, 438 U.S. at 124.²³

In a related vein, proving the amount of interim damages, particularly with respect to raw land, is generally an exercise in wholesale speculation. E.g., *Andrus v. Allard*, *supra*, 444 U.S. at 66 ("Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform"); *Mosca v. United States*, 417 F.2d 1382, 1386 (Ct. Cl. 1967); *City of Austin v. Teague*, 570 S.W.2d 389, 395 (Tex. 1978) ("Anticipated rentals from land that is presently undeveloped is just as speculative and uncertain as measuring anticipated profits from a presently unestablished business.").

23.

"The plain fact is that the police power regulation of land use is not reducible to a simple equation. The ever-changing face of our land condemns us to an ever-shifting standard of what will be determined to be constitutionally 'overzealous' . . . There has never been a readily ascertainable way to tell when a regulation is or will be a 'taking' and none is in prospect." *White River* at 225.

E. Recent Decisions Of This Court Involving Constitutional Torts By Government Officials And 42 United States Code Section 1983 Favor Federal Deference To Available State Remedies; Land Use Regulation Is Perhaps The Classic Example Of "Special Circumstances Counseling Hesitation" Where Money Damages Would Be Inappropriate.

Principles of federalism afford state courts broad discretion in fashioning remedies for violations of federal rights, so long as the state courts provide an adequate remedy. See generally, Hill, *Constitutional Remedies*, 60 Colum. L. Rev. 1109, 1118 (1969). This Court has interfered with the states' choice of remedy for violations of a federal right only where the sole remedy offered in the state courts is wholly inadequate, in effect denying any relief for the violation. *Aboud v. Detroit Board of Education*, 431 U.S. 209, 237-242 and n.45 (1977); see also, *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). Indeed, this Court has specifically expressed a willingness to defer to traditional remedies afforded under state law in the face of state or local actions resulting in a taking. *Parratt v. Taylor*, 451 U.S. 527, 537-539 (1981); *Hudson v. Palmer*, 468 U.S. 517, 533 (1984).

Past cases involving damages actions arising either directly under the Constitution or under 42 United States Code section 1983 do not assist appellant. E.g., *Owen v. City of Independence*, 445 U.S. 622 (1980); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, *supra*, 403 U.S. 388. In these decisions, as well as in others involving a constitutional claim to a monetary remedy, the Court has consistently emphasized that there may be "special circumstances counselling hesitation" where money damages would not be appropriate. *Bivens*, *supra*, 443 U.S. at 396-397; *Owen*, *supra*, 445 U.S. at 651; see also, *Carlson v. Green*, 446 U.S. 14, 18 (1980); *Davis v. Passman*, 442 U.S. 228 (1979).

Amici respectfully submit that the factors discussed in part IV(D) of this brief constitute such "special circum-

stances counselling hesitation," and that a compelled damages remedy is singularly inappropriate in the case of excessive regulation. It is not "damages or nothing" in this case (cf. *Bivens*, *supra*, 403 U.S. at 410 (Harlan, J., concurring)); another "remedy, equally effective," exists.

Appellant's reliance on section 1983 is particularly misplaced in light of recent Supreme Court decisions finding governmental immunity for state and local officials unless appellees demonstrate that the exact requirements of the constitutional right at issue had been spelled out by a federal court prior to the alleged violation. *Davis v. Scherer*, 468 U.S. 183, 191 (1984); *Harlow v. Fitzgerald*, *supra*, 457 U.S. at 818; Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will The Statute Remain Alive or Fade Away?*, 60 New York Univ. L.R. 1, 24 (1985). Inasmuch as there is perhaps no branch of constitutional law in as great a state of flux as takings jurisprudence (C. Haar, *Land Use Planning* (3d ed. 1966) 766), it is especially inappropriate to rely on section 1983 to support creation of an interim damages remedy in this case.

CONCLUSION

Either the appeal should be dismissed for want of a substantial federal question or the judgment of the California Court of Appeal should be affirmed.

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